Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Law

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VEGGIE LIBEL MEETS FREE SPEECH: A CONSTITUTIONAL ANALYSIS OF AGRICULTURAL DISPARAGEMENT LAWS

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I. INTRODUCTION

In February 1989, the Natural Resources Defense Council (NRDC) issued a report[1] in which the NRDC contended that young children faced increased dangers created by pesticide use.[2] The publication of this report and the resulting publicity caused a firestorm of debate.[3] In part, the NRDC report concerned the effects of the herbicide daminozide, also known as Alar.[4] The CBS news program "60 Minutes" reported on the NRDC publication, highlighting NRDC's warnings about Alar,[5] a chemical which was used by apple growers to stimulate growth and enhance apple appearance.[6] American consumers responded to the program by boycotting apples and apple products.[7]

Washington state apple growers subsequently filed suit against the NRDC, CBS, and CBS affiliates airing the broadcast in Washington.[8] Alleging that the broadcast was inaccurate and disparaging, the apple growers sued to recoup the economic losses from the

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[1] BRADFORD H. SEWELL & ROBIN M. WHYATT, M.P.H., NATURAL RESOURCES DEFENSE COUNCIL, INTOLERABLE RISK: PESTICIDES IN OUR CHILDREN'S FOOD (1989).

[2] *See* Auvil v. CBS "60 Minutes", 800 F. Supp. 941, 942-43 (E.D. Wash. 1992) (Auvil II), *aff'd*, 67 F.3d 816 (9th Cir. 1995); *see also* Leslie Roberts, *Pesticides and Kids*, 243 SCIENCE 1280 (1989).

[3] Linda M. Correia, *"A" is for Alar: EPA's Persistent Failure to Promptly Remove Hazardous Pesticides from the Food Supply*, 16 Chem. Reg. Rep. (BNA) No. 20, at 868 (Aug. 14, 1992).

[4] *See id.*; Auvil II, 800 F. Supp. at 942-43.

[5] *See* Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 937-41 (E.D. Wash. 1992) (Auvil I) (reprinting transcript of "60 Minutes" broadcast).

[6] *Id.* at 930; *see also infra* notes 31-34 and accompanying text.

[7] Auvil II, 800 F. Supp at 942; Auvil I, 800 F. Supp. at 930. The use of Alar had prompted consumer concern, boycott, and controversy three years earlier. *See* Nader v. EPA, 859 F.2d 747, 749-51 (9th Cir. 1988) (outlining the administrative proceedings preceding the 1989 controversy), *cert. denied*, 490 U.S. 1034 (1989); Bruce E.H. Johnson & Susanna M. Lowry, *Does Life Exist on Mars? Litigating Falsity in a Non-"Of and Concerning" World*, 12 COMM. LAW. 1, 20-21 (1994)

[8] Auvil I, 800 F. Supp. at 931.

scare.[9] The Ninth Circuit recently affirmed the decision of the Washington federal district court to grant the defendants' motions for summary judgment, dismissing the apple growers' suit.[10] Both courts held that the plaintiffs failed to meet their burden of proving that the broadcast was verifiably false.[11]

Since the eruption of the Alar controversy, agriculture and pesticide lobbyists[12] have persuaded eleven state legislatures to enact statutes authorizing damages for "the disparagement of any perishable agricultural product."[13] Concerned that it would inhibit debate on health issues, Governor Roy Romer of Colorado vetoed one such bill after it passed in the state legislature.[14]

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[9] *See id.* at 930-31.

[10] Auvil v. CBS "60 Minutes", 67 F.3d 816 (9th Cir. 1995) (Auvil IV), *aff'g* Auvil v. CBS "60 Minutes", 836 F. Supp. 741 (E.D. Wash. 1993) (Auvil III) (dismissing suit against CBS and "60 Minutes"). The local affiliates, the NRDC, and Fenton Communications had earlier been dismissed as defendants. *See* Auvil II, 800 F. Supp at 945; Auvil I, 800 F. Supp at 943.

[11] Auvil IV, 67 F.3d at 823; Auvil III, 836 F. Supp. at 742.

[12] *See infra* notes 90-91.

[13] FLA. STAT. ch. 865.065 (1994); *see* ALA. CODE § 6-5-620 (Supp. 1995); ARIZ. REV. STAT. ANN. § 3-113 (Supp. 1995); GA. CODE ANN. § 2-16-1 (Supp. 1995); IDAHO CODE § 6-2001 (1995); LA. REV. STAT. ANN. § 3:4501 (West Supp. 1995); MISS. CODE ANN. § 69-1-253(a) (1995); OHIO REV. CODE ANN. § 2307.81 (Anderson 1995 & Supp. 1996); OKLA. STAT. ANN. tit. 2, §§ 3011-12 (West Supp. 1996); S.D. CODIFIED LAWS ANN. § 20-10A-2 (1995); TEX. CIV. PRAC. & REM. CODE ANN. § 96.001-.004 (West 1995); *see also* COLO. REV. STAT. §§ 6-1-105(1)(e), (h), 6-1-113 (1992) (providing damages for deceptive trade practices, including product disparagement); COLO. REV. STAT. § 12-16-115(c) (1992) (making it a felony to "intentionally make false or misleading statements" about the market condition of agricultural commodities).

Agricultural product disparagement bills are currently pending in seven states. *See* H.R. 106, 76th Iowa Gen. Assem., Reg. Sess. (1995); S. 445, Md. Leg. (1996); H.R. 949, 179th Pa. Gen. Assem., Reg. Sess. (1995); S. 160, S.C. Statewide Sess. (1995); H.R. 735, Vt. Leg., Adjourned Sess. (1996); H.R. 1098, 54th Wash. Leg., Reg. Sess. (1995); H.R. 702, 92d Wis. Leg., Reg. Sess. (1995).

As many as ten other states have considered similar bills. *See* S. 492, Cal. Reg. Sess. (1995); S. 311, Del. Leg. (1991); S. 234, 89th Ill. Gen. Assem., Reg. Sess. (1995); H.R. 5810, 87th Mich. Leg., Reg. Sess. (1994); H.R. 2804, 78th Minn. Leg., Reg. Sess. (1994); H.R. 1720, 87th Mo. Leg., 2d Reg. Sess. (1994); H.R. 367, 94th Neb. Leg., 1st Sess. (1995); H.R. 5159, 205th N.J. Leg., 1st Reg. Sess. (1992); H.R. 1192, 54th N.D. Leg. (1995); H.R. 308, 53d Wyo. Leg., Gen. Sess. (1995).

In March 1995, Louisiana Senator Craig Romero introduced a bill which would provide a cause of action to those "person[s] engaging in a business activity who [suffer] damage as a result of another person's environmental disparagement of any such business activity." La. S.B. 125, Reg. Sess. (1995). Although the bill was later withdrawn from reconsideration, the bill's introduction may signal industry's next step in its effort to silence environmentalists and consumer advocates.

[14] Berny Morson, *Veggie Slander Bill Vetoed*, ROCKY MOUNTAIN NEWS, Apr. 30, 1991, at 7. The Colorado legislature subsequently adopted a much different version of the law. *See* COLO. REV. STAT. § 6-1-105(1)(h) (1992).

Governor Romer's concern recalls the First Amendment's guarantee of free speech and the principles underlying the Supreme Court's seminal defamation decision, *New York Times Co. v. Sullivan*.[15] Deciding that the First Amendment protected certain statements even if they were defamatory, the Supreme Court imposed additional burdens on defamation plaintiffs.[16] Thus, although these agricultural statutes ostensibly create a right to bring a disparagement suit, the Supreme Court's defamation decisions cast significant doubt on their ability to withstand First Amendment challenges.[17]

Defamation laws redress false statements that harm an individual's personal reputation or deter third parties from associating with the defamed individual.[18] Similarly, the tort of injurious falsehood, which includes "product disparagement," protects plaintiffs who prove they suffered as a result of a false, disparaging statement.[19] Unlike defamation, which remedies injury to one's reputation, the tort of injurious falsehood compensates for harm to one's commercial or economic interests.[20]

Under the *New York Times* ruling, defamation plaintiffs must meet the common law requirements; and some plaintiffs must additionally prove that the allegedly defamatory statements were made maliciously.[21] Supreme Court decisions after *New York Times*

In July 1992, Delaware Governor Michael Castle also vetoed a law prohibiting the disparagement of agricultural food products, expressing concern that the law would "set a potentially harmful precedent by unnecessarily establishing a narrow cause of action geared to particular conduct relating to a specific business." Letter from Michael Castle, Governor of Delaware, to the Members of the Delaware State Senate of the 136th General Assembly (July 14, 1992) (on file with the *Virginia Environmental Law Journal*); *see* S. 311, Del. Leg. (1991). Similarly, in 1993, a proposed "broccoli libel" law in Texas which had prompted debate between growers and consumer groups passed the House, but it never reached the Senate floor. Robert Elder, Jr., *Newcomers, Tort Reformers Stagger to Finish*, TEX. LAW., June 7, 1993, at 8. On January 23, 1995, Representative Bob Turner introduced another version of the bill to the House, which was enacted in May 1995. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 96.001 (West 1995).

15 376 U.S. 254 (1964). For further discussion, see *infra* part III.C.

16 376 U.S. at 254.

17 *See infra* part III.C for a discussion of the Supreme Court's decisions. *See infra* part IV for an application of these decisions to agricultural product disparagement statutes.

18 RODNEY A. SMOLLA, THE LAW OF DEFAMATION § 1.03[2] (1995) (quoting Restatement of Torts § 559 (1938)).

19 Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 904 (1989).

20 SMOLLA, *supra* note 18, § 11.02[4].

21 In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court prohibited the award of presumed or punitive damages without proof of actual malice, regardless of the nature of the plaintiff. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court

have more fully defined the plaintiff's burden of proof in a defamation action.[22] Although its application to product disparagement actions remains uncertain, the injurious falsehood doctrine,[23] coupled with recently-enacted state laws, may chill potentially beneficial debate regarding health issues. Those concerned about the use of pesticides may censor themselves to avoid potential liability and thus limit the progress of the environmental movement. At present, however, no court has decided a case involving the constitutionality of veggie libel laws.[24] This Note will evaluate whether these laws can survive a constitutional challenge.[25]

Although the legal and financial difficulties experienced by growers in the wake of the Alar scare prompted the enactment of several veggie libel statutes,[26] these statutes may fail to accomplish at least one of their goals — to relax the plaintiff's burden of proof.[27] These statutes may soon face constitutional challenge because they defy established defamation law by shifting the burden of proving the falsity of the statement and fault of the defendant from the plaintiff to the defendant.[28] Limiting free speech on important matters such as food safety and public health may also require a higher standard of fault than the negligence standard

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required plaintiffs suing media defendants to establish the falsity of the statements before recovering for defamation. Both of the decisions dramatically increased the burdens on a defamation plaintiff. *See infra* part III.B.1 for an explanation of the common law elements of defamation.

[22] *See infra* part III.C.2 for a discussion explaining judicial distinctions between plaintiffs and the resulting variances in burdens of proof.

[23] *See infra* notes 162-69 and accompanying text for a discussion of the applicability of defamation jurisprudence to product disparagement.

[24] A 1993 action filed in Georgia by the American Civil Liberties Union on behalf of Action for a Clean Environment and Parents for Pesticides Alternatives sought to have Georgia's agricultural product disparagement statute declared unconstitutional. Action for a Clean Environment v. State, 457 S.E.2d 273 (Ga. Ct. App. 1995). The Georgia Court of Appeals ruled that, in order to be a justiciable controversy, a claim may not be "merely a question as to the abstract meaning or validity of a statute." *Id.* at 274.

[25] The narrowness of the laws' purpose may itself be subject to constitutional attack as "unconstitutionally target[ing] the speech of critics of the agricultural and chemical industries." *Suits Spur Product Disparagement Statutes*, NEWS MEDIA & L., Summer 1994, at 3, 5. A reviewing court may find that the law, like the ordinance contested in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (concerning an ordinance which prohibited the display of a symbol relating to race, color, creed, religion or gender which one has reason to know will provoke others), "impose[s] special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. However, such an analysis is beyond the scope of this Note.

[26] *Suits Spur Product Disparagement Statutes*, *supra* note 25, at 3.

[27] *See infra* part III.A.

[28] *See infra* part IV.D.-E (analyzing the constitutionality of these aspects of the veggie libel laws).

specified in the statutes.[29] Moreover, because public debate on food safety is so important, the presumption of falsity in the statutes may render them unconstitutional.[30]

Part I of this Note presents the Alar controversy and outlines the progression of the apple growers' lawsuit. It also introduces the veggie libel laws, describing the main facets of the statutes and the variations enacted by the states. Part II outlines the common law elements of a defamation action and a product disparagement claim, the distinction between the two torts, and the constitutional doctrine surrounding defamation actions. Part III addresses the constitutional shortcomings of veggie libel laws and concludes that the statutes, as enacted, unconstitutionally inhibit protected speech.

II. VEGGIE LIBEL LAWS: THE ALAR CONTROVERSY AND SUBSEQUENT ENACTMENTS

A. The Alar Controversy and the Resulting Fear

Analysis of the veggie libel laws must begin with their impetus — the Alar controversy. A look at Alar use on agricultural food products, the challenges to its regulatory approval, and its alleged carcinogenic effects provides a context for the veggie libel enactments, the public nature of the issue, and the resulting public debate.

1. The History of Alar Use

In 1963, the agricultural industry first registered the pesticide daminozide, commonly know as Alar, for use as a plant hormone (specifically, a growth regulator).[31] Five years later, the industry registered Alar for use on apples.[32] The chemical demonstrated many benefits, and appeared suitable for various uses. With the use of Alar, apples stayed on trees longer, had longer shelf life, and

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[29] *See infra* part IV.D.2.

[30] *See infra* part IV.E.

[31] Marina M. Lolley, Comment, *Carcinogen Roulette: The Game Played Under FIFRA*, 49 MD. L. REV. 975, 984 n.82 (1990). Registration of pesticides is governed at the federal level by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Following registration of a pesticide, the EPA sets tolerance levels under the Federal Food, Drug and Cosmetic Act (FFDCA), which establishes the maximum amount of residue that may remain on or in foods on which the registered chemical is used. 21 U.S.C. § 301 (1988 & Supp. V 1993); *see also* Correia, *supra* note 3, at 869. These levels are enforced by the Food and Drug Administration. *Id.*

[32] *See* Lolley, *supra* note 31, at 984; Nader v. EPA, 859 F.2d 747, 749 (9th Cir. 1988), *cert denied*, 490 U.S. 1034 (1989).

displayed more uniform color and firmness.[33] Consequently, the apple industry and growers throughout the country embraced Alar and applied it to their crops.[34]

By July 1984, five studies suggested that daminozide caused cancer in laboratory animals.[35] Also, daminozide converts into "an even more potent carcinogen,"[36] unsymmetrical 1,1 dimethylhydrazine (UMDH), when apples are processed into apple juice or apple sauce.[37] Responding to these safety concerns, the Environmental Protection Agency (EPA) announced it would conduct a "'special review' to determine whether to publish a notice of intent to cancel Alar's registration."[38] Upon such review, the EPA's Scientific Advisory Panel[39] concluded that the studies provided information insufficient to assess any risk to human health.[40] The EPA retreated: it refused to initiate cancellation proceedings and instead merely required Uniroyal, the manufacturer of Alar, to conduct additional tests.[41]

In January 1989, reacting to the preliminary results of Uniroyal's toxicology studies, the EPA again announced plans to initiate can-

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33 Lolley, *supra* note 31, at 984.

34 *Id.* (asserting that the apple industry has used Alar extensively); *see also* Auvil I, 800 F. Supp. at 934 (calling the use of Alar a "common agricultural practice . . . for more than two decades").

35 Lolley, *supra* note 31, at 984. The five studies revealed a statistically significant relationship between ingestion of Alar and tumor development in lab animals. *Nader*, 859 F.2d at 749.

36 Lolley, *supra* note 31, at 984.

37 *Id.* UMDH is also used as a rocket fuel. Auvil I, 800 F. Supp. at 940 (reprinting a transcript of the "60 Minutes" broadcast).

38 49 Fed. Reg. 29,126 (1984); *see Nader*, 859 F.2d at 749.

39 FIFRA permits the EPA to cancel a pesticide's registration "[i]f it appears . . . that a pesticide . . . when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." 7 U.S.C. § 136d(b) (1988 & Supp. V 1993). The Act also requires the Administrator to submit a proposed cancellation notice to an advisory panel for comment "as to the impact on health and the environment." *Id.* § 136w(d). In 1988, FIFRA was amended to require that all pesticides registered before November 1, 1984 be re-registered. Act of Oct. 25, 1988, Pub. L. No. 100-532, 102 Stat. 2688 (codified as amended at 7 U.S.C. § 136a-1 (1994)); *see* Lolley, *supra* note 31 at 985.

40 Pesticide Tolerance for Daminozide, 51 Fed. Reg. 12,889 (1986). In support of its decision, the review board pointed to several other "data gaps," including the extrapolation of animal test results to humans. *Nader*, 859 F.2d at 750. The board concluded that the studies "were 'inadequate to perform a qualitative risk assessment.'" *Id.* Curiously, the EPA had also considered these same shortcomings *before* deciding to pursue cancellation proceedings. Lolley, *supra* note 31, at 985. The Department of Agriculture, responding to the EPA's findings, asked the agency to reconsider by weighing the many benefits of Alar's use against its uncertain risks. *Id.*

41 51 Fed. Reg. 12,889 (1986).

cellation proceedings.[42] While this announcement was publicized,[43] the matter did not attract widespread public attention until CBS aired a "60 Minutes" broadcast concerning the NRDC report.[44] The NRDC report, *Intolerable Risk: Pesticides in Our Children's Food*, contended that, because children consume more food per unit of body weight than adults, as well as more fruits and fruit products, they face greater health risks from pesticides than adults.[45] Although the NRDC report addressed twenty-three pesticides, the CBS broadcast focused on apples, Alar, and the EPA's inability to initiate cancellation proceedings.[46] As a result of this attention, American consumers refrained from purchasing apples and apple products such as apple sauce and apple juice.[47] Not only did sales decline dramatically,[48] but "[p]ublic school systems in New York, Los Angeles, Atlanta, San Francisco, Chicago[,] and dozens of other cities banned apples from their cafeterias."[49]

The EPA and the Department of Agriculture tried to stabilize the market and quell public fears by contesting the findings of the NRDC report.[50] To show support and assist growers, the government purchased fifteen million dollars worth of apples.[51] The

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[42] Pesticide Tolerance for Daminozide, 54 Fed. Reg. 6392 (1989); *see also* Lolley, *supra* note 31, at 986; Correia, *supra* note 3, at 877.

[43] Philip Shabecoff, *100 Chemicals for Apples Add Up to Enigma on Safety*, N.Y. TIMES, Feb. 5, 1989, at 22.

[44] Correia, *supra* note 3, at 868.

[45] The report estimated that 240 in one million children will develop cancer from daminozide before reaching the age of six. Lolley, *supra* note 31, at 987. The EPA estimated that in an 18 month period, only nine in one million children would suffer from cancer. The estimates varied because of the "different exposure periods, six years versus nine months, and different assumptions about dose-response and exposure levels." *Id.*; *see also* Correia, *supra* note 3, at 875 n.114.

[46] *See* Auvil II, 800 F. Supp. at 934, 937-41.

[47] Frank B. Cross, *The Public Role in Risk Control*, 24 ENVTL. L. 888, 943 n.198 (1994) (noting various effects of the "60 Minutes" broadcast).

[48] Regulation Governing the Fresh Apple Diversion Program for 1988 Crop Apples, 55 Fed. Reg. 5563 (1990) ("[A]s of May 1, 1989 the national supply of 1988 crop apples was 53% greater than the previous three year average.").

[49] Correia, *supra* note 3, at 875.

[50] Claiming that there was no imminent hazard to children, the EPA, USDA, and FDA issued a joint statement which urged consumers to continue to purchase apple products. *Apple Panic Overblown Reaction to Inadequate Data, Critics Say*, CHEM. MARKETING REP., Mar. 20, 1989, at 9.

[51] *Government Will Buy Apples Left Over from the Scare on Alar*, N.Y. TIMES, July 8, 1989, at A6. The article also cited the USDA as stating that the price of apples per carton had declined about three dollars from their price in 1988. *Id.*; *see also* Regulation Governing the Fresh Apple Diversion Program for 1988 Crop Apples, 55 Fed. Reg. 5563 (1990).

The government's decision to reimburse the apple growers resembled a 1960 legislative authorization of 10 million dollars as "indemnity payments" to cranberry growers after a

apple industry attempted to discredit the NRDC's findings by issuing its own statements[52] and garnering support from various Congressmen,[53] but growers and processors across the country still suffered economic losses.[54]

2. *Auvil v. CBS "60 Minutes"*

Responding to the "60 Minutes" program, Washington state apple growers filed a civil suit against CBS and the NRDC, alleging defamation and disparagement.[55] Forty-seven hundred growers joined the class action, seeking to recoup their economic losses and arguing that Alar posed minimal risks.[56]

To establish a claim of defamation or disparagement, the statement at issue must be understood to "concern" the plaintiff.[57] The district court found that the NRDC's report neither mentioned a

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November 1959 announcement by Arthur Flemming, Secretary of Health, Education and Welfare, initiated a food scare. *Indemnity Payments to Growers of Cranberries and Caponnettes: Hearings on H.R. 12117 Before the Subcomm. of the House Comm. on Appropriations*, 86th Cong., 2d Sess. (1960) [hereinafter *Cranberry Hearings*]. Flemming announced that two batches of cranberries grown in the Pacific Northwest had been contaminated after a weed killer, shown to cause cancer in rats, was improperly used on the berries. *Id.* at 45 (reprinting as Exhibit I Flemming's statement to the press on Nov. 9, 1959). As a result of Flemming's suggestion that consumers refrain from purchasing the berries for Thanksgiving (the busiest time of year for cranberry sales), "grocery stores dumped cranberries from shelves, restaurants stopped serving them, and health officials banned their sale." Bob Secter, *Cranberry Panic of '59 Sowed Seeds of Future Crop Scares*, CHI. SUN-TIMES, July 31, 1994, at 6. The payments were granted because the public announcement proved to be "the virtual libeling of an entire industry" based on the improper use of the pesticide by less than one percent of cranberry growers. *Cranberry Hearings*, *supra*, at 34.

[52] *See* Sibella Kraus, *The Apple Industry Rebounds*, SAN FRANCISCO CHRON., Nov. 8, 1989, at 8 (discussing apple industry's public relations effort); *see also* Leslie Roberts, *Alar: The Numbers Game; Dispute Over Cancer Danger*, 243 SCIENCE 1430 (1989) (describing advertising campaign by International Apple Institute two weeks after release of NRDC report); Terence M. Finan, *Apple Growers Predicting Bumper Crop*, UPI, Aug. 18, 1989.

[53] *Apple Panic Overblown*, *supra* note 50, at 9 (noting comments by Senators John Warner and Steve Symms calling for executive action to deal with the controversy).

[54] Precise figures for the losses that growers and other apple product manufacturers suffered vary. A federal district court stated that the losses amounted to "perhaps as much as $75 million dollars." Auvil II, 800 F. Supp. at 931. *Cf. Daminozide Posed No Serious Health Risk, Koop, Others Say on Controversy's Anniversary*, 15 Chem. Reg. Rep. (BNA) No. 47, at 1686 (Feb. 28, 1992) (reporting that apple growers allege that losses totalled as much as $100 million).

[55] *See* Auvil II, 800 F. Supp. at 931 (explaining that the suit was originally filed in Yakima County Superior Court and subsequently removed to federal court).

[56] *Id.* In addressing the distinctions between the plaintiff's defamation and disparagement claims, the court noted that, though different, the disparagement claim was "subject to the same First Amendment requirements that govern actions for defamation." *Id.* at 933.

[57] Langvardt, *supra* note 19, at 908 (product disparagement); SMOLLA, *supra* note 18, §4.09[1] (defamation).

particular grower nor focused simply on apples, but instead addressed the use of pesticides on twenty-seven fruits and vegetables. Therefore, the court found the NRDC's statements did not "concern" the plaintiffs.[58] Finding that the growers had failed to satisfy this essential element, the court dismissed their claim against the NRDC.[59]

The court also rejected the claims against CBS.[60] To sustain a claim of product disparagement or defamation against a media defendant, a plaintiff must establish not only that the statement at issue "concerns" it, but also that the statement is false.[61] Noting the difficulty of proving that the statements concerning Alar were false, the court found CBS's statements to be protected speech.[62] By dismissing this action, the court buttressed the arguments of agriculture lobbyists advocating agricultural food product disparagement statutes.[63] The resulting enactments reflect not only the concern and frustration of the agriculture industry, but also its success.

B. Veggie Libel

To prove defamation, a plaintiff must establish that a defamatory statement[64] concerning the plaintiff was published or communicated to a third person.[65] The level of fault, such as negligence or recklessness, may vary depending upon the nature of the plaintiff and the nature of the controversy.[66] To establish product disparagement, a plaintiff must prove that a false disparaging statement was communicated maliciously to a third person, resulting in actual pecuniary losses.[67] The uncertainty and difficulty in satisfying this burden of proof "spurred" enactment of agricultural product disparagement statutes.[68]

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[58] Auvil II, 800 F. Supp. at 944.

[59] *Id.*

[60] Auvil III, 836 F. Supp. at 743.

[61] *See infra* notes 121-22, 139, 150, 155-57 and accompanying text for a discussion of the falsity requirement for common law defamation and disparagement claims.

[62] Auvil III, 836 F. Supp. at 743.

[63] *Suits Spur Product Disparagement Statutes*, *supra* note 25, at 4.

[64] A defamatory statement was defined as one that "affected the plaintiff's reputation so as to lower the community's estimation or deter others from dealing with him." RESTATEMENT (SECOND) OF TORTS § 558 (1977); *see infra* notes 108-11 and accompanying text.

[65] *See infra* notes 112-20 and accompanying text.

[66] *See infra* part III.C.2.

[67] *See infra* part III.B.2.

[68] *See infra* notes 215-19 and accompanying text

1. Veggie Libel Defined

In January 1991, Colorado State Representative Steve Acquafresca, an apple grower, introduced a measure to the state assembly. It was the first of a series of state proposals collectively known as "veggie libel laws." The bill initially attracted jokes and giggles, as well as international attention.[69] However, Acquafresca explained that the bill was designed to protect farmers from food safety scares,[70] arguing that the bankruptcy of farmers or ranchers is "no laughing matter."[71] Acquafresca called the Alar scare "unfounded,"[72] and the Colorado legislature responded by adopting his proposal.[73] However, Governor Roy Romer vetoed the bill, citing First Amendment concerns.[74] Romer feared that such a law would jeopardize the "constitutional protection [that] gives individuals, as well as consumer groups and researchers[,] the guaranteed right to raise legitimate questions about food safety and quality."[75] Instead, Louisiana became the first state to adopt a law prohibiting disparagement of any of the state's agricultural food products.[76]

Although they vary in level of protection, many of the enacted laws and pending bills employ similar language and similar structures.[77] Although the notion of veggie libel at first provoked humor, the passage of the law in Louisiana, and its subsequent adoption in ten other states, has prompted efforts from consumer rights groups, environmentalists, and the media to prevent additional states from enacting similar legislation.[78]

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[69] *See, e.g.*, John Sanko, *Romer Polishes all the Right Apples in Veto of Veggie Bill*, ROCKY MOUNTAIN NEWS, May 3, 1991, at 12 [hereinafter *Romer Polishes all the Right Apples*] (characterizing the bill as "the world-acclaimed and much-guffawed veggie bill . . . the one that said Thou Shalt Not Take the Name of a Veggie, Fruit or Other Perishable Product in Vain").

[70] John Sanko, *Nader Gives Bill the Raspberries: Consumer Advocate Joins Attack on Measure Giving Libel Protection to Perishable Goods*, ROCKY MOUNTAIN NEWS, Mar. 8, 1991, at 14.

[71] *Romer Polishes All the Right Apples*, *supra* note 69.

[72] *Id.*

[73] *Id.*

[74] *See supra* note 14 and accompanying text.

[75] *Colorado Anti-Libel "Veggie Bill" Wilts Under Governor's Veto*, CHI. TRIB., Apr. 30, 1991, at C3.

[76] LA. REV. STAT. ANN. §§ 3:4501 to :4504 (noting that the chapter was added by 1991 La. Acts 972).

[77] The enacted laws in Lousiana, Idaho, Georgia, Florida, South Dakota, Mississippi, and Oklahoma employ similar language and formats in their definitions and proscriptions.

[78] *See* Bill Rogers, *Veggie Libel? Censored by the Food Industry*, PUBLISHERS' AUXILIARY, Dec. 19, 1994, at 4 (urging readers to contact the South Carolina Press Association for information and "talking points" to oppose a veggie libel law currently pending in South Carolina); *You Still Can't Say Beans About Georgia Produce*, ATLANTA J. & CONST.,

2. *Veggie Libel Statutory Language*

As many as twenty-seven states have considered, or are currently considering, an agricultural food product disparagement statute.[79] Fundamentally, the statutes provide producers of agricultural food products with a cause of action against anyone who disparages their products.[80] Under these statutes, the main elements of agricultural food product disparagement are: (1) dissemination to the public in any manner;[81] (2) of false information the disseminator knows to be false;[82] (3) stating or implying that a perishable food product is not safe for consumption by the consuming public;[83] (4) information is presumed false when not based on reasonable and reliable scientific inquiry, facts, or data;[84] (5) disparagement provides a cause of action for damages;[85] and (6) any action must be filed within one or two years.[86]

Some states significantly expanded the class of potential parties by defining "producer" to include the "entire chain from grower to consumer."[87] Striving to relax the burdens of proving a defamation

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July 27, 1994, at C2 (stating the local ACLU's position that "environmental groups and others have to be able to speak"); Elder, *supra* note 14, at 8 (describing the concerns of consumer rights groups regarding a veggie libel law that failed in the 1993 session of the Texas legislature).

[79] *See supra* note 13.

[80] *See* ALA. CODE §§ 6-5-620 to -625; ARIZ. REV. STAT. ANN. § 3-113; FLA. STAT. ch. 865.065; GA. CODE ANN. §§ 2-16-1 to -4; IDAHO CODE §§ 6-2001 to -2003; LA. REV. STAT. ANN. §§ 3:4501-:4504; MISS. CODE ANN. § 69-1-253(a); OHIO REV. CODE ANN. § 2307.81 ; OKLA. STAT. ANN. tit. 2, §§ 3010-3016; S.D. CODIFIED LAWS ANN. §§ 20-10A-1 to -4.

[81] *See, e.g.*, LA. REV. STAT. ANN. § 3:4502(1).

[82] *See, e.g., id.* Georgia's law, however, reaches *only* dissemination that is "willful and malicious." GA. CODE ANN. § 2-16-2(1).

[83] *See, e.g.*, LA. REV. STAT. ANN. § 3:4502(1).

[84] *See, e.g., id.*

[85] *See, e.g., id.* § 3:4503.

[86] *See, e.g., id.* § 3:4504 (action must be filed within one year); GA. CODE ANN. § 2-16-4 (action must be filed within two years).

[87] *See, e.g.*, GA. CODE ANN. § 2-16-2(3); *see also* ALA. CODE § 6-5-622 (authorizing a suit by "any person who produces, markets, or sells a perishable food product"); FLA. STAT. ch. 865.065(3) (granting "any producer or any association representing producers" the right to sue). Idaho, Louisiana, Oklahoma, and South Dakota limit plaintiffs to "producers." IDAHO CODE § 6-2003(1); LA. REV. STAT. ANN. § 3:4503; OKLA. STAT. ANN. tit. 2, § 3012; S.D. CODIFIED LAWS ANN. § 20-10A-2.

In its recently enacted law, Ohio clarified the identity of potential plaintiffs by specifying that "any person who grows, raises, produces, distributes or sells a perishable agricultural product or any association representing such persons" may sue under its provisions. OHIO REV. CODE ANN § 2307.81(B)(4). Similarly, bills proposed in Pennsylvania and Illinois define "producer" to include "any person engaged in growing or raising a perishable food product or commodity, or marketing or manufacturing such product or commodity for consumer use." H.R. 949, 179th Pa. Gen. Assem., Reg. Sess. § 3 (1995); S. 234, 89th Ill.

action,[88] some state legislatures codified sweeping prohibitions.[89] In so doing, the agriculture lobby may have virtually prohibited discussion of consumer safety issues related to fruits and vegetables.[90]

Other provisions of these statutes also demonstrate the power of the agricultural lobby.[91] South Dakota's statute permits producers to recover treble damages from "any person who disparages a perishable agricultural food product *with intent to harm* the producer."[92] Alabama's law specifies that "[i]t is no defense . . . that the actor did not intend, or was unaware of, the act charged."[93] The laws enacted in Arizona and Ohio even grant the court discretion to award "the successful party court costs and reasonable attorney fees."[94] Despite the questionable constitutionality of

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Gen. Assem., Reg. Sess. § 10 (1995) (stating that producer includes "any person engaged in growing, or raising . . . or preparing an agricultural product for consumer use").

[88] As noted, the *Auvil* plaintiffs experienced difficulty in establishing that the NRDC's report specifically concerned the apple growers and their products. *See supra* notes 57-59 and accompanying text. By expanding the potential class of plaintiffs, the laws seek to relax this common law requirement. *See infra* part IV.A.

[89] *See infra* part IV.A.

[90] The statements generally must state or imply that "the . . . product is not safe for consumption by the consuming public." ALA. CODE § 6-5-621(1); ARIZ. REV. STAT. ANN. § 3-113(A); FLA. STAT. ch. 865.065(2)(a); GA. CODE ANN. § 2-16-2(1); IDAHO CODE § 6-2002(1)(b); LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a); OHIO REV. CODE ANN. § 2307.81(B)(1); S.D. CODIFIED LAWS ANN. § 20-10A-1(2).

The statutes define "perishable agricultural food products" to mean "any food product of agriculture or aquaculture which is sold or distributed in a form that will perish or decay beyond marketability within a period of time." *See, e.g.*, LA. REV. STAT. ANN. § 3:4502(2).

A bill currently pending in Wyoming also prohibits disparaging remarks about livestock. *See* H.R. 308, 53d Wyo. Leg., Gen. Sess. (1995).

[91] As expected, the pesticide industry is also lobbying state legislatures to enact agricultural product disparagement laws. At a fall conference of the American Crop Protection Association (ACPA), the director of government affairs of Monsanto, a pesticide manufacturer, announced that "agricutural product disparagement" would again be a "significant issue" in 1995, as it was in 1994. *Barolo Says Streamlining Office Will Enhance Credibility of Program*, 18 Chem. Reg. Rep. (BNA) No. 32, at 995 (Nov. 4, 1994). The Monsanto executive also heads the ACPA's State Affairs Committee. *Id.*

[92] S.D. CODIFIED LAWS ANN. § 20-10A-3 (emphasis added). Bills in Illinois and Pennsylvania allow for similar awards. S. 234, 89th Ill. Gen. Assem., Reg. Sess. (1995) ("[I]f the statement was made with malice, the producer or owner shall be entitled to punitive damages in an amount equal to no less than [three] times the actual damages."); H.R. 949, 179th Pa. Gen. Assem., Reg. Sess. (1995) (proposing cause of action for "compensatory and punitive damages").

Originally, Florida's statute similarly authorized the recovery of treble damages for intentional disparagement. In May 1995 however, the legislature deleted the provisions which authorized such a recovery. S. 622, Fla. Leg. § 3 (1995).

[93] ALA. CODE § 6-5-623.

[94] ARIZ. REV. STAT. ANN. § 3-113(C); OHIO REV. CODE ANN. § 2307.81(C).

these provisions, their very existence may be enough to silence consumer activists and environmentalists fearing ruinous liability.[95]

III. Constitutional Concerns Surrounding Veggie Libel

In *New York Times Co. v. Sullivan*, the Court recognized that "erroneous statement is inevitable in free debate, and . . . [thus] must be protected."[96] In subsequent cases, the Court has tried to clarify the influence of the First Amendment on the long-recognized action for defamation.[97] In one case, the Supreme Court applied the First Amendment defamation jurisprudence to a product disparagement claim.[98] Because a statement concerning the safety of vegetables may lead to liability for both torts, an analysis of the vegetable libel laws must address the underlying First Amendment principles, distinctions between the two torts, and the evolution of the defamation doctrine.

A. First Amendment Principles Underlying Defamation Claims

Although the First Amendment's text "unequivocally" prohibits Congress, and the states by incorporation, from making laws which abridge the freedom of speech,[99] "it is the decisions of the United States Supreme Court these past two hundred years that have given the amendments life . . . [and provided] the basis for the kind of freedom and justice all Americans are guaranteed and enjoy."[100] Generally, the Supreme Court protects speech "unless shown to likely produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[101] Certain narrowly-defined classes of speech may be restricted without raising constitutional concerns.[102] "These

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[95] South Dakota's triple damages provision may exceed the constitutional limitations on damages. That issue is beyond the scope of this Note.

[96] 376 U.S. at 271-72.

[97] *See infra* part III.C.

[98] Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984); *see infra* notes 167-71 and accompanying text.

[99] Rodney A. Smolla, Free Speech in an Open Society 5 (1992) [hereinafter Free Speech].

[100] James E. Leahy, The First Amendment, 1791-1991: Two Hundred Years of Freedom 17 (1991).

[101] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[102] *See generally* Leahy, *supra* note 100, at 109-40 (outlining permissible state regulations of speech such as reasonable, nondiscriminatory time, place, and manner restrictions; treatment of certain governmental property as closed to the public; zoning laws excluding adult movie theaters from certain areas; and laws prohibiting speech which produces a "clear & present danger . . . of a substantive evil").

include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ."[103] The Supreme Court recognizes societal interest in "preventing and redressing attacks upon reputation."[104] Although some speech may be regulated, the laws, regulations, or ordinances addressing such concerns must be "carefully drafted so that maximum protection is given to the right of free speech."[105]

While the agricultural product disparagement statutes establish statutory torts, the nature of their prohibitions implicates First Amendment arguments raised by the Supreme Court's review of defamation or libel cases.[106]

B. Defamation Versus Product Disparagement

Although conceptually distinct, the tort of defamation and the tort of product disparagement share several common law elements.[107] Defamation focuses "on the protection of a plaintiff's reputation" in the sphere of personal dignity.[108] By contrast, product disparagement, a type of injurious falsehood, reflects an interest in compensating economic injury to business or commercial interests.[109] Since disparaging published statements about a product might also damage one's reputation,[110] distinctions between the two causes of action and the scope of their First Amendment protection may be inconsistent and confusing.[111] This section will outline the common law elements of each tort and analyze their similarities and differences.

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[103] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[104] FREE SPEECH, *supra* note 99, at 118.

[105] LEAHY, *supra* note 100, at 136.

[106] Note that because of the nature of the defendants envisioned by these statutes, i.e. non-competitors, the First Amendment doctrine concerning commerical speech will not be addressed.

[107] Lisa M. Arent, *A Matter of "Governing Importance": Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*, 67 IND. L.J. 441, 447 (1992).

[108] Langvardt, *supra* note 19, at 907.

[109] SMOLLA, *supra* note 18, § 11.02[1].

[110] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 128, at 965 (5th ed. 1984).

[111] Arent, *supra* note 107, at 443; *see* Aetna Casualty & Sur. Co. v. Centennial Ins. Co., 838 F.2d 346, 351 (9th Cir. 1988) (comparing the two torts to determine if insurance policy which covered trade libel applied to instant action); Guess, Inc. v. Superior Court of Los Angeles County, 176 Cal. App. 3d 473, 479 (Cal. Ct. App. 1986) (comparing defamation and trade libel to determine applicability of limitations period for personal defamation claims to a trade libel action); Idaho Norland Corp. v. Caeller Indus., 509 F. Supp. 1070 (D. Colo. 1981).

1. The Elements of Defamation

Common law defined defamation[112] as an "unprivileged publication of false and defamatory statements concerning a plaintiff."[113] A defamatory statement had to affect the plaintiff's reputation so as to lower community esteem or deter others from dealing with him.[114] A plaintiff was not required to prove any actual harm to reputation; once the plaintiff proved a prima facie case, the court presumed damages.[115]

After proving the statement was defamatory, to establish a prima facie case, a plaintiff had to prove that the statement "concerned" the plaintiff.[116] Often referred to as the "of and concerning" element,[117] the statement had to be understood to refer specifically to the plaintiff.[118] The plaintiff did not need to be mentioned by name, so long as a reasonable person hearing or reading the statement would have concluded that the plaintiff was the party described.[119]

Under common law, a plaintiff met the prima facie burden once he proved that a defamatory statement concerned him.[120] Although a plaintiff had to argue that the statement was false, common law did not require the plaintiff to prove falsity.[121] Instead, the court traditionally presumed the statement was false.[122] The common law allowed only truth as a defense.[123] Thus, if a defendant proved that the statement was substantially true, a plaintiff could not recover for defamation.[124]

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112 Defamation refers to the twin torts of libel and slander. SMOLLA, *supra* note 18, §1.04(1). Libel applies to a statement that was written, printed, or "communicated in some . . . physical form." *Id.* If, instead, the statement was made orally or "by transitory gestures," it was treated as slander. *Id.* Because both the common law and constitutional law treat the two torts similarly, the general term "defamation" will be used in this Note. Langvardt, *supra* note 19, at 907.

113 Langvardt, *supra* note 19, at 907 (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

114 *See id.* at 908, (citing RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

115 SMOLLA, *supra* note 18, § 1.03[2].

116 Langvardt, *supra* note 19, at 908 (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

117 *Id.*

118 SMOLLA, *supra* note 18, § 4.09[1].

119 Langvardt, *supra* note 19, at 908. In *Rosenblatt v. Baer*, the Supreme Court held that "there must be evidence showing that the attack was read as specifically directed at the plaintiff." 383 U.S. 75, 81 (1966).

120 SMOLLA, *supra* note 18, § 1.03[2].

121 *Id.*

122 Langvardt, *supra* note 19, at 909.

123 KEETON ET AL., *supra* note 110, § 116, at 839.

124 *Id.*

Until the 1964 decision, *New York Times Co. v. Sullivan*,[125] defamation was also a strict liability tort.[126] The plaintiff did not need to establish fault of the defendant with respect to the statement's falsity or its "harmful nature."[127] Presuming reputational harm upon clear evidence of a false and defamatory statement, courts permitted juries to estimate the amount necessary to compensate the plaintiff.[128]

2. *The Elements of Product Disparagement*

Instead of redressing reputational harm, the product disparagement tort reaches derogatory statements about the plaintiff's property or the quality of his products.[129] Accordingly, the comments reached by the disparagement tort far surpass the scope of defamation.[130] In a product disparagement action, the statements may disparage the plaintiff's business, its "character, . . . its employees, . . . its customers, or its popularity."[131] Although the statements must "concern" the plaintiff's business, the plaintiff's burden concentrates primarily on the effects of the statements.[132]

The effects of the statement must include a realized, pecuniary loss.[133] Under this essential element, termed the "special damages" requirement, the plaintiff must present evidence illustrating

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125 376 U.S. 254 (1964).

126 Langvardt, *supra* note 19, at 909.

127 Arent, *supra* note 107, at 448.

128 Langvardt, *supra* note 19, at 911.

129 Product disparagement is a type of injurious falsehood. Originally addressing such issues as "oral aspersions cast upon the plaintiff's ownership of land" which thus prevented an individual from leasing or selling it, the tort was known as "slander of title." KEETON ET AL., *supra* note 110, § 128, at 962; *see also* Ruder & Finn, Inc. v. Seaboard Sur. Co., 422 N.E.2d 518, 521-22 (N.Y. 1981). Two hundred years later, in the nineteenth century, the action was expanded to include oral and written statements affecting the quality of one's property, rather than solely one's title. KEETON ET AL., *supra* note 110, § 128, at 963.

130 Langvardt, *supra* note 19, at 914.

131 KEETON ET AL., *supra* note 110, § 128, at 966.

132 Commentators suggest that the tort of product disparagement includes an "of and concerning" element. Langvardt, *supra* note 19, at 914, 956 (citing Blatty v. New York Times Co., 728 P.2d 1177, 1182-84 (Cal. 1986)); Arent, *supra* note 107, at 446 ("Both torts [defamation and product disparagement] require proof that the words refer to the plaintiff or her goods.") (citing William v. Burns, 540 F. Supp. 1243 (D. Colo. 1982)); *see also* Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164 (Colo. Ct. App. 1989), *cert. denied*, 803 P.2d 517 (Colo. 1991). However, the Ninth Circuit recently suggested that the requirement may not be conclusively established. Auvil IV, 67 F.3d at 816 n.4 ("Applicability of the 'of and concerning' requirement to product disparagement law is raised on appeal. We need not decide this issue . . . because . . . the growers cannot show falsity."). For a more detailed discussion regarding whether product disparagement should include such a requirement, see Langvardt, *supra* note 19, at 955-58.

133 Arent, *supra* note 107, at 447-48; Langvardt, *supra* note 19, at 918.

loss of particular sales to identified persons.[134] Courts today often relax this burden by permitting plaintiffs to introduce evidence revealing a decline in sales after the publication of the statement.[135] In such cases, courts also require the plaintiff to illustrate the false statement was widely circulated and eliminate all other potential causes for the sales decline.[136]

In addition to special damages, the plaintiff must prove that (1) the statement was communicated or published to a third person;[137] (2) the statement "play[ed] a material and substantial part in inducing others not to deal with the plaintiff;"[138] (3) the statement was false;[139] and (4) the defendant acted with wrongful intent or malice.[140]

The fault requirements vary among jurisdictions.[141] Some courts adopt the Second Restatement of Torts approach, requiring the plaintiff to establish that the defendant recognized or should have recognized that publication would cause harm; that the defendant intended such harm; or that the defendant knew the statement was false yet published the statement in reckless disregard of its truth or falsity.[142] Other courts adopt an approach "substantially identical to the cause of action for product disparagement described by the Restatement."[143] These courts require proof that the defend-

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[134] Langvardt, *supra* note 19, at 918.

[135] *Id.* at 918-19. As Prosser and Keeton note, if courts insist on evidence of actual fault before imposing liability, the necessity of such a strict burden on establishing a loss of sales is not necessary to protect an innocent defendant. KEETON ET AL., *supra* note 110, § 128, at 973; *see also* Arent, *supra* note 107, at 448 n.36.

[136] Langvardt, *supra* note 19, at 918-19. The author cites three cases in which the court relaxed the special damages requirement: Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 7-8 (Minn. 1984); Charles Atlas, Ltd. v. Time-Life Books, Inc., 570 F. Supp. 150 (S.D.N.Y. 1983); Annbar Assoc. v. American Express Co., 565 S.W.2d 701 (Mo. Ct. App. 1978). Langvardt, *supra* note 19, § 1.03[2] nn.104-05.

[137] SMOLLA, *supra* note 18, § 11.02[2][c].

[138] KEETON ET AL., *supra* note 110, § 128, at 967.

[139] SMOLLA, *supra* note 18, § 11.02[2][a].

[140] *Id.* § 11.02[2][e].

[141] KEETON ET AL., *supra* note 110, § 128, at 968-70; SMOLLA, *supra* note 18, § 11.02[2][e]; Langvardt, *supra* note 19, at 916-18.

[142] Arent, *supra* note 107, at 449 (citing RESTATEMENT (SECOND) OF TORTS § 623A (1977)); *see also* Contract Dev. Corp. v. Beck, 627 N.E.2d 760, 764 (Ill. App. Ct. 1994) (holding that more recent cases require plaintiff to prove actual malice to establish prima facie case of slander of title); A&B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1294-95 (Ohio 1995) (applying actual malice to standard product disparagement claim, since the standard applies to a defamation claim based on same facts).

[143] Systems Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1140-41 (3d Cir. 1977); *see also* Langvardt, *supra* note 19, at 916.

ant made the false statement maliciously.[144] Guided by the malice requirement for the "closely-related tort of slander of title,"[145] common law malice generally involves "hate, spite, or ill-will directed at plaintiff by defendant."[146] Still other courts have found sufficient fault when the plaintiff proves the defendant "intended to interfere with the plaintiff's economic interests."[147]

3. *Common Law Defamation and Disparagement Compared*

As noted above, the common law elements of defamation and disparagement were in some ways similar. Both required publication[148] of statements "of and concerning"[149] the plaintiff. However, defamation and disparagement differed in their requirements for fault, falsity, damages, and defendant privilege.[150] The constitutional development of defamation law, beginning with *New York Times v. Sullivan*, altered these traditional requirements and muddied the distinctions between the two torts.[151]

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144 *Systems Operation, Inc.*, 555 F.2d at 1140-41.

145 *Id.* at 1140.

146 Langvardt, *supra* note 19, at 913 n.69 (citing Turner v. Welliver, 411 N.W.2d 298 (Neb. 1987), for the definition of malice under common law) (other citations omitted).

147 *Id.* at 916-17; *see also* SMOLLA, *supra* note 18, § 11.02[2][e] (noting the lack of consensus regarding the "sort of intent, malice, or fault" required for injurious falsehood claims).

148 SMOLLA, *supra* note 18, § 11-02[1] (noting the injurious falsehood requirement that the statement be "public[ized] to a third person").

149 *See supra* notes 116-19 and accompanying text regarding the "of and concerning" requirement for defamation claims.

150 *See generally* Arent, *supra* note 107, at 447-50 (outlining the differences between product disparagement and defamation); Langvardt, *supra* note 19, at 907-19 (comparing and contrasting defamation and injurious falsehood).

While both absolute and conditional privileges exist, the conditional privilege is more often employed in the business defamation context. Langvardt, *supra* note 19, at 911. One type of conditional privilege protects the statement if deemed "fair comment." KEETON ET AL., *supra* note 110, § 115. Generally defined as "a statement of opinion about a matter of public concern," courts differ as to the fair comment privilege's coverage. Langvardt, *supra* note 19, at 912 n.62. While a majority of courts require that the statement be purely opinion, other courts extend the privilege to include "false statements of supposed fact." *Id.* at 912 n.62. Courts also recognize a conditional privilege for statements whereby the party "made an accurate report concerning a governmental proceeding that was open to the public." *Id.* at n.60.

The defense of privilege has also been applied to product disparagement suits. In *Dairy Stores, Inc. v. Sentinel Publishing Co.*, the court decided that a conditional privilege "should exist wherever it would exist for a defamation action." 516 A.2d 220, 226 (N.J. 1986).

151 *See infra* part III.C.

To sustain a common law claim for product disparagement, the plaintiff must always establish special damages.[152] This onerous "special damages" burden often led plaintiffs to present their cases as defamation actions,[153] for which the common law traditionally "presumed damages."[154] However, the Court's adoption of a fault standard in *New York Times v. Sullivan* now prevents many plaintiffs from enjoying this presumption.

The falsity element provides another example of how *New York Times v. Sullivan* blurred the distinctions between defamation and disparagement. Under common law defamation, harmful statements about the plaintiff were presumed false.[155] By contrast, in a successful product disparagement claim, the plaintiff must establish that the statement is false.[156] As one commentator noted, however, "[the falsity] distinction [between defamation and disparagement] may have disappeared completely with the Supreme Court's elimination of the presumption of falsity in most defamation cases."[157]

Similarly, the strict liability nature of the defamation tort all but disappeared with the Supreme Court's *New York Times v. Sullivan* decision.[158] Rather than presuming malicious intent, the Supreme Court now requires different levels of fault depending on whether the plaintiff is considered a public or a private person.[159] Consequently, this distinction between the common law torts of defamation and product disparagement has also faded. Under current standards, both torts now require the plaintiff to prove some level of fault.[160]

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[152] Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164, 1167 (Colo. Ct. App. 1989) (citing Williams v. Burns, 540 F. Supp. 1243 (D. Colo. 1982)), *cert. denied*, 803 P.2d 517 (Colo. 1991); Advanced Training Sys. v. Caswell Equip. Co., 352 N.W.2d 1, 7 (Minn. 1984); *see also* Payrolls & Tabulating, Inc. v. Sperry Rand Corp., 257 N.Y.S.2d 884, 887 (N.Y. App. Div. 1965) (noting that "if it is merely disparagement of product special damages must be alleged and proved").

[153] Zerpol Corp. v. DMP Corp., 561 F. Supp. 404, 409 (E.D. Pa. 1983).

[154] *See supra* note 115 and accompanying text.

[155] *See supra* notes 121-22 and accompanying text.

[156] KEETON ET AL., *supra* note 110, § 128, at 967. The requirement is reflective of the tort from which it is derived — "injurious falsehood." *See id.* at 962-63.

[157] Arent, *supra* note 107, at 449; *see also infra* notes 204-08 and accompanying text for a discussion of the First Amendment's impact on the falsity presumption.

[158] *See supra* notes 125-28 and accompanying text regarding the state of the law prior to *New York Times Co. v. Sullivan.*

[159] *See infra* part III.C.2.

[160] *Id.*

While the two causes of action traditionally involved different conduct, injuries, and remedies, application of First Amendment principles to defamation law blurred these distinctions.[161]

C. Constitutionalizing Defamation

New York Times Co. v. Sullivan and the "constitutionalization" of defamation law[162] heightened the plaintiff's proof requirements.[163] The decision also muddied the distinction between defamation and product disparagement. In the decision, the Supreme Court noted that the First Amendment guarantees free speech because the framers "eschewed silence coerced by law."[164] The Court's attention to First Amendment implications significantly impacted three of the common law elements in a defamation action: the fault requirement, the recovery of damages, and the presumption of falsity.[165]

While courts recognize the "overlap" between defamation and disparagement actions,[166] the constitutional protection ultimately afforded to each of these actions may differ. In *Bose Corp. v. Consumers Union, Inc.*,[167] the Supreme Court applied principles of First Amendment defamation jurisprudence to a product disparagement action.[168] Although the Court did not address whether defamation jurisprudence applies to product disparagement generally, the Court held that the product disparagement issue in *Bose* "fit[ ] easily within the breathing space that gives life to the First Amendment."[169] Because speech regarding the safety of agricul-

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161 *See* Langvardt, *supra* note 19, at 919.

162 Justice White included this phrase in his concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring) ("New York Times Co. v. Sullivan was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander.") The phrase reveals the Supreme Court's determination that the Constitution supplants established common law defamation principles in certain contexts. Since *New York Times Co. v. Sullivan*, the Court has been articulating those contexts.

163 *See infra* part III.C.1.

164 376 U.S. at 270 (quoting Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

165 *See* Arent, *supra* note 107, at 453-55.

166 Georgia Soc'y of Plastic Surgeons v. Anderson, 363 S.E.2d 140, 144 (Ga. 1987) (noting that overlap may occur particularly in cases alleging disparagement of plaintiff's business or product since statement may not reflect solely on product but may also suggest plaintiff's personal incompetence or inefficiency).

167 466 U.S. 485 (1984).

168 *Id.* at 513.

169 *Id.* (qualifying its holding by noting the Court of Appeals' doubts about applying *New York Times Co. v. Sullivan* protection to a product disparagement claim yet "express[ing] no view on that ruling"); *see* Unelko Corp. v. Rooney, 912 F.2d 1049, 1058

tural food products is "speech that matters,"[170] and because potential errors in that speech may "fit[ ] easily within the breathing space that gives life to the First Amendment,"[171] the constitutionality of the veggie libel laws should be assessed according to defamation jurisprudence.

1. New York Times Co. v. Sullivan: *Adding the Element of Fault to Defamation*

New York Times v. Sullivan introduced "breathing space" for speech regarding public officials.[172] To that end, the Court dramatically increased the necessary level of fault for defamation actions.[173] Holding that First Amendment restrictions require proof that an allegedly defamatory statement was made with "actual malice," the Court noted that "erroneous statement is inevitable in free debate, and . . . [thus] must be protected."[174] The actual malice standard heightened the fault requirement for defa-

(9th Cir. 1990) (noting that product disparagement claims "are subject to the same First Amendment requirements that govern actions for defamation"), *cert. denied*, 499 U.S. 961 (1991); Auvil I, 800 F. Supp. at 933 (quoting Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990)); *see also* Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164, 1167 (Colo. Ct. App. 1989) (citing *Bose* for the proposition that constitutional protections afforded in defamation actions apply to product disparagement suits), *cert. denied*, 803 P.2d 517 (Colo. 1991); Langvardt, *supra* note 19, at 938 n.205 (citing cases which read *Bose* as applying to injurious falsehood claims).

[170] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) (quoting the Court's statement in Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974), that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters").

[171] *See Bose*, 466 U.S. at 513.

[172] 376 U.S. at 271-72. *New York Times Co. v. Sullivan* involved the publication of an advertisement by civil rights activists in an effort to raise funds "to Defend Martin Luther King and the Struggle for Freedom in the South." *Id.* at 257. The ad contended that, in response to Dr. King's peaceful protests, "[t]hey have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times." *Id.* at 257-58. In fact, Dr. King had been arrested only four times, and one officer involved in an arrest of Dr. King denied that Dr. King had been assaulted. *Id.* at 259. Louis Sullivan, the Commissioner of Public Affairs (the agency that supervised the police department in Montgomery), demanded a retraction, contending that the advertisement suggested involvement by the police. *Id.* at 256, 258. The newspaper refused, arguing that the statements did not reflect on Sullivan. *Id.* at 262. Sullivan sued for libel. *Id.* at 256. The lower courts held that the statements "concerned" Sullivan and that the Times acted maliciously. *Id.* at 262-64. The state courts imputed malice to the newspaper's "irresponsibility" in failing to uncover the advertisement's inaccuracies and by the newspaper's refusal to grant Sullivan's request for a retraction. *Id.* On appeal, the Supreme Court addressed the application of the First Amendment to state rules regarding defamation actions, and reversed the judgment. *Id.* at 264.

[173] *See supra* notes 125-28 and accompanying text, explaining that defamation was originally a strict liability tort.

[174] 376 U.S. at 271-72.

mation of public officials, forcing plaintiffs to show the defendant knew that the statements were false or recklessly disregarded the truth.[175] The Court initially focused on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[176] Although the Court radically departed from the traditional common law fault requirements of defamation, the Court remained unclear about the extent to which the First Amendment actual malice standard applied.

2. *The Public Nature of the Issue or the Notoriety of the Plaintiff?*

In *Rosenbloom v. Metromedia, Inc.*, a plurality of four justices decided to apply the actual malice standard in all cases involving matters of public interest.[177] In the view of the plurality, First Amendment protection extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[178] The remaining four justices deciding the case declined to adopt this issue-based analysis, however, and the focus of the Court thus remained on the notoriety of the plaintiff.[179]

Subsequently, in *Gertz v. Robert Welch, Inc.*, a majority of the Court refused to extend the *New York Times* doctrine to statements concerning private plaintiffs.[180] Noting the states' interest in protecting individuals from defamatory falsehood, however, the Court espoused a new rule authorizing states to determine their own liability standards for defamation claims involving private individuals, providing the state did not impose liability without fault.[181] As a result, "forty-two jurisdictions in the United States [now] hold that negligence is the standard for private plaintiffs to

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[175] *Id.* at 280 & n.20 (referring to opinions in ten different states espousing a similar standard). Note that the Court in *New York Times Co. v. Sullivan* applied the heightened definition requirements only to cases concerning public officials. *Id.* at 283 n.23.

[176] *Id.* at 270.

[177] 403 U.S. 29, 43-44 (1971). However, the three-member plurality declined to determine the precise extent of such a rule's application. *Id.* at 44-45.

[178] *Id.* at 44.

[179] *See id.* at 57-62 (White, J., concurring); 62-78 (Harlan, J., dissenting); 78-87 (Marshall, J., joined by Stewart, J., dissenting).

[180] 418 U.S. 323, 345-46 (1974) (plaintiff, an attorney for murder victim's family in wrongful death action, filed suit against a magazine for falsely stating that plaintiff "framed" murderer).

[181] *Id.* at 347. The Court considered both the threat of injury to a private individual and the inherent danger to a media defendant in curtailing the availability of presumed damages. *Id.* at 346.

recover against a media defendant even when the subject matter of the speech is of public concern."[182] However, four state courts recently applied the *New York Times* actual malice requirement to defamation actions involving issues of public interest and concern, even when the defamation plaintiff is a private person.[183] These decisions affirm the importance of debate and speech on matters of public interest such as public health.[184]

In *Gertz*, the Court provided several reasons for allowing states to protect private plaintiffs with lower standards of fault in defamation actions.[185] The Court recognized that public figures and officials have "significantly greater access to the channels of effective communication" and are better able to engage in self-help by contradicting the lie or correcting the error.[186] The Court further noted that private plaintiffs deserve more protection because, unlike public plaintiffs, they do not "invite attention and comment."[187]

These Supreme Court decisions obligate courts to make two determinations before applying the correct fault standard. First, the court must decide whether a plaintiff is a public figure or private individual.[188] To qualify as a public figure, courts generally require some kind of plaintiff involvement in some public controversy.[189]

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[182] Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417, 423-24 (N.J. 1995), *cert denied*, 64 U.S.L.W. 3467 (U.S. Jan. 8, 1996) (No. 95-424). The 42 jurisdictions adopting such a standard include 38 states. *See id.* at 423 n.1.

[183] Mount Juneau Enters v. Juneau Empire, 891 P.2d 829, 837 (Ala. 1995); Romero v. Thomson Newspapers, Inc., 648 So.2d 866, 869 (La. 1995) ("There is authority for applying [the actual malice standard] when an article concerns public issues, even though the plaintiff is a private person.") *cert. denied*, 115 S. Ct. 2556 (1995); *Turf Lawnmower Repair Inc.*, 655 A.2d at 427, 434-35 (ruling that the actual malice requirement applies to businesses that "intrinsically implicate[ ] important public interests, [such as] a matter of public health"); Mucci v. Dayton Newspapers, Inc., 654 N.E.2d 1068, 1073-74 (Ohio Ct. App. 1995) (requiring private figure plaintiff, a physician, to satisfy actual malice standard because of importance of public issue when proving defamation by innuendo or implication).

[184] *See supra* note 183

[185] *See* 418 U.S. at 344-52.

[186] *Id.* at 344.

[187] *Id.* at 345.

[188] "The practical task of classifying particular plaintiffs as public or private figures has been left primarily to lower court judges, and the task has proved difficult." SMOLLA, *supra* note 18, §§ 2.09[1], 2.29; *see* Rosenblatt v. Baer, 383 U.S. 75, 88 (1966) ("[I]t is for the trial judge in the first instance to determine whether the proofs show [plaintiff] to be a 'public official.'"). For cases deeming defamation plaintiffs to be public figures, see Tracy A. Bateman, *Who is "Public Figure" for Purposes of Defamation Action?*, 19 A.L.R. 5th 1, 348 (1994); SMOLLA, *supra* note 18, § 2.09.

[189] SMOLLA, *supra* note 18, § 2.09[2].

In *Gertz*, the Court distinguished two categories of public figures.[190] The court first recognized those who "achieve such pervasive fame or notoriety [as to be] . . . a public figure for all purposes and in all contexts."[191] The Court also created a category of limited-purpose public figures — individuals who either voluntarily injected themselves or were "drawn into a particular public controversy, [and who] thereby [became] a public figure for a limited range of issues."[192] This second category may prove significant to agricultural product disparagement statutes when an agricultural producer, grower, or retailer is drawn into a controversy concerning the safety of a particular product.[193]

A court must also determine whether the speech involves a matter of public concern. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Supreme Court adopted a rule for cases with private plaintiffs involving statements that do not address matters of public concern.[194] With such statements, private plaintiffs need not prove "actual malice."[195] In these cases, courts must also evaluate the nature of the statements and whether they concern purely private matters or relate to the public interest.[196]

3. Awarding Damages: The Effect of the Fault Requirement

Concerned in part about media self-censorship, the Court in *Gertz* also curtailed damages.[197] Specifically, the Court prohibited states from awarding presumed or punitive damages without proof of actual malice.[198] In *New York Times*, citing past availability of damages without proof of fault, the Court explained its concern

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190 *See* 418 U.S. at 351.

191 *Id.*

192 *Id.* Lower courts applying this idea have developed various tests to determine whether a plaintiff is a limited public figure. *See, e.g.*, Lerman v. Flynt Distrib. Co., 745 F.2d 123, 136-37 (2d Cir. 1984) (adopting a four-part test), *cert. denied*, 105 U.S. 1054 (1985); Clark v. American Broadcasting Companies, 684 F.2d 1208, 1218 (6th Cir. 1982) (adopting an objective three-part test), *cert. denied*, 460 U.S. 1040 (1983); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980) (adopting another three-part test), *cert. denied*, 449 U.S. 898 (1980); *see also* SMOLLA, *supra* note 18, § 2.09 (discussing each test and factors considered generally by courts).

193 *See infra* part IV.D.1 (assessing the public nature of potential veggie libel plaintiffs).

194 *See* 472 U.S. 749, 757-60 (1985).

195 *Id.* at 761 (finding that speech which does not involve matters of public concern are of "reduced constitutional value" and thus states need not require proof of actual malice to allow awards of presumed and punitive damages).

196 *Id.*

197 *See* 418 U.S. at 348-50.

198 *Id.* at 349.

that fear of damage awards might inhibit speech.[199] Reiterating this concern, in *Gertz* the Court held that a private plaintiff who establishes less than actual malice may only recover compensation for actual injury.[200]

However, the Court subsequently retreated from this position. In *Dun & Bradstreet*,[201] the Court permitted presumed damages without a showing of actual malice when the action is filed by a private plaintiff and the defendant's statements do not concern a matter of public interest.[202] Deciding that defamatory speech which "concerns no public issue" does not warrant First Amendment protection, the Court reinforced the importance of speech relating to public matters.[203]

4. Adding an Element of Falsity

Considering the issue of falsity requirements, the Court in *Gertz* emphasized the importance of the First Amendment.[204] Although the Court opined that an "erroneous statement of fact is not worthy of constitutional protection,"[205] it recognized that such statements are inevitable in "free debate." The Court held that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[206] Since *Gertz*, the Court has required both private and public plaintiffs to establish the falsity of the contested statements before recovering in a defamation claim against a media defendant.[207] This also represents a dramatic

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199 376 U.S. at 277-78.

200 418 U.S. at 349. Consistent with the Court's reasoning for relaxed burdens in private plaintiff cases, the majority also held that "state remedies . . . [should] reach no farther than is necessary to protect the legitimate interest involved." *Id.* However, the Court explained that actual damages might include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350.

201 472 U.S. 749 (1985).

202 *Id.* at 761.

203 *Id.* at 757-60; *see also* Connick v. Meyers, 461 U.S. 138, 145 (1983) (noting that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values'" (citations omitted)).

204 418 U.S. at 340.

205 *Id.*

206 *Id.* at 341. The Court firmly stated that "[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id.* at 340.

207 Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986). Note that in *Hepps*, which involved a media defendant, the Court had no "need [to] consider what standards would apply if the plaintiff sues a nonmedia defendant." *Id.* at 779 n.4. Justice Brennan, in a concurring opinion, addressed this issue. Stressing his *Dun & Bradstreet* concerns, Brennan noted the First Amendment principle that "'the inherent worth of . . . speech in terms of its capacity for informing the public does not depend on the identity of

departure from the common law presumption of falsity in defamation claims.[208]

In sum, the First Amendment requires a court to assess whether the complaining party in a defamation action is a public official, public figure, limited public figure, or private figure.[209] Next, a court must determine if the contested issue concerns a matter of public interest or if it is a purely private matter.[210] These determinations often define the level of fault required to prove defamation.[211] The level of fault also impacts the plaintiff's recovery of damages.[212] The First Amendment permits only actual damages for defamation actions unless a plaintiff can also show that the defendant made the statements with actual malice, or that the statements did not involve a matter of public concern.[213] Finally, the First Amendment requires a public or private plaintiff to prove the falsity of a media defendant's statements.[214]

Thus, just as the common law requires a product disparagement plaintiff to establish the falsity of the statement, fault or malice by the defendant, and actual damages caused by the statement, the Supreme Court now requires defamation plaintiffs to overcome similar constitutional hurdles. Therefore, to determine whether veggie libel laws may withstand constitutional scrutiny, they must be evaluated under current defamation jurisprudence.

IV. The Constitutional Shortcomings of Veggie Libel Laws

Following the Alar controversy, the rigorous requirements resulting from the Supreme Court's constitutional treatment of defamation and the stringent common law burdens remaining for product disparagement actions provided ripe grounds for legislative reform.[215] Several state legislatures established causes of

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the source, whether corporation, association, union, or individual.'" *Id.* at 780 (Brennan, J. concurring) (citing 472 U.S. at 781 (Brennan, J., dissenting) (quoting First National Bank v. Bellotti, 435 U.S. 765, 777 (1978))).

208 *See supra* notes 121-22 and accompanying text.

209 *See supra* notes 188-93 and accompanying text.

210 *See supra* notes 194-96 and accompanying text.

211 *See supra* notes 180-87 and accompanying text.

212 *See supra* notes 197-203 and accompanying text.

213 *See supra* note 201 and accompanying text.

214 *See supra* note 207 and accompanying text.

215 *See Barolo Says Streamlining Office Will Enhance Credibility of Program*, *supar* note 91, at 995 (announcing continued efforts of pesticide industry to enact agricultural product disparagement statutes); *see also Suits Spur Product Disparagement Statutes*, *supra* note 25, at 3.

action similar to product disparagement or defamation actions.[216] Under most of these statutes,[217] plaintiffs must establish five main elements: (1) dissemination to the public in any manner; (2) of false information that the disseminator knows to be false; (3) stating or implying that a perishable food product is not safe for public consumption; (4) information is presumed false when not based on reasonable and reliable scientific inquiry, facts, or data; and (5) the disparagement provides a cause of action for damages.[218] While these elements resemble those of defamation and disparagement under common law, the statutes relax the plaintiff's heavy burden for many of the elements.[219]

Treatment of the falsity and fault elements in the statutes might generate the most concern.[220] By establishing a negligence standard of fault and presuming falsity, the veggie libel laws seek to circumvent the burden of proof required by the Constitution.[221] As a result, the enactments might not withstand constitutional scrutiny. A constitutional attack would focus on the nature of the plaintiffs, the nature of the defendants, and the nature of the speech.

A. "Of and Concerning" an Agricultural Food Product

Unlike common law product disparagement or defamation actions, veggie libel laws require only that a statement be "of and concerning" an agricultural food product.[222] Under the statutes,

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[216] Only one statute specifies that "[t]his statutory cause of action is not intended to abrogate the common law action for product disparagement or any other cause of action otherwise available." IDAHO CODE § 6-2003(6); *see also* OKLA. STAT. ANN. tit. 2, § 3012 (noting that the statute should not limit any cause of action otherwise available under "the Oklahoma Deceptive Trade Practices Act or any state or federal slander or libel law").

In addition, other states express narrow causes of action "for damages" which permit plaintiffs to recover "any other appropriate relief." *See* S.D. CODIFIED LAWS ANN. § 20-10A-2 (entitled "Cause of Action for Damages"); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b).

[217] *See, e.g.*, *supra* note 80 (citing statutes enacted in Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Mississippi, Ohio, Oklahoma, and South Dakota).

[218] *See supra* notes 64-68 and accompanying text.

[219] The First Amendment applies to the States through the due process clause of the Fourteenth Amendment. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 749 n.1 (1976) (citing Bigelow v. Virginia, 421 U.S. 809, 811 (1975)); Schneider v. State, 308 U.S. 147, 160 (1939).

[220] *See* Johnson & Lowry, *supra* note 7, at 22-23 (explaining potential dangers and effects of product disparagement laws).

[221] *See id.*

[222] *See*, FLA. STAT. ch. 865.065; LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a) ("[D]isparagement means dissemination to the public in any manner of any false information . . . that a perishable agricultural . . . food product is not safe for con-

the disparaging statement need not concern the plaintiff, and the statutes articulate to whom a cause of action is available. Generally, "any producer"[223] may seek damages for losses resulting from disparaging statements about the fruits or vegetables they sell.[224]

This expansive provision responds to the legal obstacles faced by the apple growers faced in their *Auvil* suit.[225] The district court decided that the statements were "of and concerning" apples, and that "all apples were as suspect even if Alar-free."[226] Therefore, while the statements did not identify or refer to any of the plaintiffs specifically, "[t]o the extent that identification of growers is relevant at all, every apple grower in the country was identified."[227] The newly-enacted laws also opened the door to non-growers, such as those who produced apple juice and apple sauce, who were injured by the Alar controversy.[228]

The libel laws also require that the statements "concern" the safety of the food products.[229] Requiring that the disparaging statement "stat[e] or impl[y] that the [product] is not safe for consumption by the consuming public"[230] narrows the scope of pro-

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sumption."); OKLA. STAT. ANN. tit. 2, § 3011 ("[D]isparagement means dissemination of information which casts doubt on the safety of any perishable agricultural food product."); S.D. CODIFIED LAWS ANN. § 20-10A-1(2) ("[D]issemination . . . of any information . . . that states or implies that an agricultural food product is not safe for consumption."). *Contra* IDAHO CODE §§ 6-2002(1)(a) to -2003(4) (requiring that the statement clearly concern the specific plaintiff's product rather than merely "a generic group of products"). Some states do not even expressly require that the statement be "of and concerning" an agricultural food product cultivated in its state. *See* ALA. CODE § 6-5-622; GA. CODE. ANN. § 2-16-2(2); LA. REV. STAT. ANN. § 3:4502(2); MISS. CODE ANN. § 69-1-253(a); S.D. CODIFIED LAWS ANN. § 20-10A-1(2).

223 *See supra* note 87; *see, e.g.*, LA. REV. STAT. ANN. § 3:4502(1).

224 All of the statutes require that the statements concern the safety of the food for public consumption. *See supra* note 90.

225 *See supra* notes 57-59 and accompanying text.

226 Auvil I, 800 F. Supp. 928, 935 & n.4 (E.D. Wash. 1992). *But see* Auvil V, 1995 U.S. App. LEXIS 27658, at *7 n.4 (refusing to decide whether the "of and concerning" element applies to product disparagement actions).

227 *Id.*

228 *See supra* note 47 and accompanying text (describing range of parties injured by the Alar controversy).

229 ALA. CODE § 6-5-621(1) (requiring dissemination of "information that a perishable food product . . . is not safe for human consumption"); ARIZ. REV. STAT. ANN. § 3-113(A) (same); FLA. STAT. ch. 865.065(2) (same); GA. CODE ANN. § 2-16-2(1) (same); LA. REV. STAT. ANN. § 3:4502(1) (same); MISS. CODE ANN. § 69-1-253(a) (same); S.D. CODIFIED LAWS ANN. § 20-10A-1(2) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(a)(3) (same); *see* IDAHO CODE § 6-2002(1)(b) ("[S]tatement clearly imputes the safety of the product."); OKLA. STAT. ANN., tit. 2, § 3011(1) (prohibiting "dissemination of information to the public in any manner which casts doubt on the safety of any perishable agricultural food product").

230 *See, e.g.*, LA. REV. STAT. ANN. § 3:4502.

tected statements, but this requirement may not narrow the class of potential plaintiffs.

B. Dissemination versus Publication

Many statutes also alter the level of proof required for a statement to qualify as a "publication." Although defamation and common law disparagement both require publication, many of the veggie laws require only that the information be "disseminat[ed] to the public."[231] However, since publication already requires a statement communicated to a third person,[232] this change may not prove as significant as other changes achieved with the laws.

A court interpreting the meaning of "disseminate" may require that the plaintiff meet the requirements of its literal definition. A court might insist that the communication or publication be "widespread" or "become general knowledge."[233] However, with the role of the modern media in society and its ability to easily transmit information, this judicial enhancement may have little practical effect.[234]

C. The Availability of Damages

Veggie libel laws often remove the special damages requirements. Under common law, product disparagement requires the plaintiff to show actual customer loss.[235] By contrast, a plaintiff relying on an agricultural food product disparagement statute need only "suffer damage as a result of another person's disparagement" in order to recover.[236] Some state statutes also permit punitive

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231 ALA. CODE § 6-5-621(1). The statutes enacted in Alabama, Florida, Georgia, Lousiana, Ohio, Oklahoma, South Dakota, and Texas all employ the term "dissemination" to define disparagement. *See e.g.*, FLA. STAT. ch. 865.065(2)(a) (requiring "willful or malicious" dissemination); GA. CODE ANN. § 2-16-2(1) (requiring also that the dissemination be willful or malicious); LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a); OHIO REV. CODE ANN. § 2307.81(B)(1); OKLA. STAT. ANN. tit. 2, § 3011(1); S.D. CODIFIED LAWS § 20-10A-1(2); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(b); *cf.* IDAHO CODE § 6-2002(1)(a) (requiring the statement to be "published"). Rather than employing the word "disparagement," Arizona's law instead prohibits "malicious public dissemination." *See* ARIZ. REV. STAT. ANN. § 3-113(A).

232 *See supra* note 137 and accompanying text.

233 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 656 (1981).

234 For example, within weeks of publication of the NRDC's report concerning carcinogenic effects of pesticides, the report received national attention after a "60 Minutes" broadcast. *See supra* notes 44-49 and accompanying text.

235 *See supra* notes 132-36 and accompanying text.

236 *E.g.*, S.D. CODIFIED LAWS ANN. § 20-10A-2.

damages.[237] Also, the statutes' treatment of other constitutional burdens, such as fault and falsity requirements, may significantly impact the availability of damages for an agricultural food product disparagement plaintiff.

D. The Fault Requirement

The standard of fault articulated in the statutes may enable a plaintiff to recover damages more easily than under the common law. Although the enactments vary somewhat, the model statute requires only that the "disseminator kn[ew] or should have known [the statement] to be false."[238] Assuming that growers or producers do not qualify as public figures, such a provision is not necessarily unconstitutional since *Gertz* authorized states to permit recovery of damages by private individuals under a standard lower than actual malice.[239] Although food safety is arguably a matter of public concern, the appropriate standard of fault need not be actual malice.[240]

Thus, analysis of the constitutionality of the statutes' standard requires an assessment of the nature of the plaintiff.[241] Under defamation jurisprudence, to determine the appropriate fault standard, a trial court must determine whether a plaintiff is a public figure, limited public figure, or private person.[242]

1. Public or Private Status of "Producer" Plaintiffs

To provide guidance to the lower courts, the Supreme Court in *Gertz* articulated two types of public figure plaintiffs. Some plaintiffs are so famous that they warrant public figure status "for all purposes and in all contexts."[243] Others may be "limited-purpose public figures" after they "voluntarily inject [themselves] or [become] drawn into a particular public controversy."[244]

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[237] *See* ALA. CODE § 6-5-622; *cf.* ARIZ. REV. STAT. ANN. § 3-113(A) (requiring proof of "malicious public dissemination" for any recovery); GA. CODE ANN. § 2-16-3 (recovery for "willful and malicious dissemination" may include punitive damages). Florida and South Dakota permit treble damages in cases in which the plaintiff proves an intent to harm the producer. FLA. STAT. ch. 865.065(3)(b); S.D. CODIFIED LAWS ANN. § 2-10A-3.

[238] LA. REV. STAT. ANN. § 3:4502(1).

[239] 418 U.S. at 347-48.

[240] *See infra* part IV.D.2.

[241] *See supra* notes 188-93 and accompanying text.

[242] *See id.*

[243] 418 U.S. at 351.

[244] *Id.*

Thus, one rationale articulated in *Gertz* to justify a reduced burden for private defamation plaintiffs may not apply to growers. Although the growers may not "invite attention"[245] in their individual capacity, like public figures, they enjoy significant access to the "channels of effective communication."[246] The Court has clarified that such access requires "regular and continu[ed] access to the media."[247] The frequent and widespread statements by spokespersons for agricultural trade groups (such as those made by the International Apple Institute in the days following the "60 Minutes" broadcast) demonstrate that growers can gain significant access to the media.[248] Because of this access, courts may conclude that growers possess the ability to vigorously and successfully seek the public's attention and should thus qualify as public figures.[249]

One New York federal district court, for example, deemed the National Nutritional Foods Association (a health food industry trade association of retailers, manufacturers and distributors) a public figure.[250] In dismissing the libel suit, the court pointed to efforts by the group to promote and publicize its products to members of the industry and the consuming public.[251] The court also

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[245] *Id.* at 345.

[246] *Id.* at 344.

[247] Steaks Unlimited Inc. v. Deaner, 623 F.2d 264, 273 (3d Cir. 1980) (citing Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979)). Requiring access to the media is consistent with the principles espoused in *New York Times*. The Court noted in that case that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies" and recognized the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270 (citations omitted).

[248] *See, e.g., A Dose of Food Product Damage Control*, 22 NAT'L J. 2236 (1990) (noting that after the "60 Minutes" broadcast on Alar, the International Apple Institute "began what would become two weeks of filing a press release every day to challenge the substance of the show"); Peter Carlson, *The Image-Makers: A Mind-Bending Tour Through the World of Washington Public Relations*, WASH. POST MAG., Feb. 11, 1990, at W31 (outlining the efforts of the apple industry's public relations team to combat the negative publicity surrounding Alar); *Industry Claims Report Overstates Risk to Kids; Produce Industry's Reaction to the Natural Resources Defense Council's Report on Pesticide Residues in Fruits and Vegetables*, SUPERMARKET NEWS, Mar. 6, 1989, at 1 (challenging the conclusions of the NRDC's report in a press statement released by the Center for Produce Quality, "the produce industry's nonprofit public relations foundation").

[249] 418 U.S. at 342 ("Those who, by reason of . . . the vigor and success with which they seek the public's attention are properly classed as public figures.").

[250] National Nutritional Foods Ass'n v. Whelan, 492 F. Supp. 374, 382 (S.D.N.Y. 1980) (holding that the National Nutritional Foods Association was a public figure because it "thrust itself into the forefront of public attention on a controversial matter of great public importance"); *see also* Bateman, *supra* note 188, at 280-84, 348-49 (outlining cases where "farmers, ranchers and the like" as well as "trade associations and cooperatives" have and have not been held to be public figures).

[251] *See Whelan*, 492 F. Supp. at 381 (noting another court's refusal to permit the same plaintiff as "an entire industry . . . [to] sue on grounds of defamation").

referred to the plaintiff's status as one of the largest representatives of health food products.[252]

Another judge opined that "[b]y placing its products on the market [a seller] invites examination and criticism, and has access to advertising further to explain and defend them."[253] The agricultural food industry, a "$40 billion industry," spends significant capital on advertising.[254] For instance, the Florida Citrus Commission recently spent one million dollars to advertise on Rush Limbaugh's radio show alone.[255]

Another court assessed one plaintiff's intensive advertising campaign and the attendant costs and deemed a corporation selling steaks to be a "limited-purpose" public figure plaintiff.[256] Reluctant to find that the plaintiff had "effectively . . . assumed the risk of potentially unfair criticism by entering into the public arena and engaging the public's attention,"[257] and thereby qualifying the corporation as a public figure, the court limited its privilege solely to the controversy giving rise to the litigation.[258]

While courts have occasionally designated corporations as public figures,[259] individual growers may be able to avoid this designation. Even though many growers organize into cooperatives,[260] a court

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252 *Id.*

253 Dairy Stores, Inc. v. Sentinel Publishing Co., 510 A.2d 220, 239 (N.J. 1986) (Garibaldi, J. concurring). *But see* Turf Lawnmower Repair, Inc. v. Bergen Record Corp, 655 A.2d 417 (N.J. 1995), *cert denied*, 64 U.S.L.W. 3467 (U.S. Jan. 8, 1996) (No. 95-424). In the majority opinion, Justice Garibaldi limited application of the actual malice requirement to cases involving businesses whose "activities . . . intrinsically implicate[ ] [an] important public interest." *Id.* at 427. The New Jersey Supreme Court further clarified that the actual malice standard is inapplicable to small individually-owned shops whose products and services do not involve those of legitimate public interest. *Id.*

254 John Kennedy, *House Agrees to Let Farmers Sue*, SUN-SENTINEL, Mar. 26, 1994, at 25A (quoting Representative Mimi McAndrews during debate of the agricultural food disparagement law in Florida).

255 *Id.*

256 Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273 n.37 (3d Cir. 1980).

257 *Id.*

258 *Id.* at 274 n.47.

259 *See* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (citing the corporation's one billion dollars in assets and recent public stock offering as evidence that the plaintiff "thrust itself into the public arena"); Martin Marietta Corp. v. Evening Star Newspapers Co., 417 F. Supp. 947, 956 (D.D.C. 1976) (noting that the category of public figures outlined in *Gertz* is an "ill-fitting mold" in which to fit corporate plaintiffs); *cf.* Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 819-821 (N.D. Cal. 1977) (rejecting the *Martin Marietta* approach to apply the *Gertz* test to a corporate plaintiff).

260 Standard and Poor's lists several cooperatives of agricultural growers: Farsouth Growers Cooperative; Fiesta Farms Cooperative; Roper Growers Cooperative; Growers Cooperative Juice Co.; South Bay Farmers Cooperative; Strathmore Cooperative Association; Manson Growers Cooperative; Dora Mount Growers Cooperative; Snokist Growers.

may find it difficult to deem an individual grower to be a public figure[261] because the statutes authorize individual growers to file suit.[262] The statutes also entitle growers' cooperatives to sue as "manufacturers or producers of agricultural food products."[263] In such a suit, designating the plaintiff as a limited-purpose public figure would impact the fault requirement noted in the statutes.[264] Under *New York Times* and its progeny, negligence alone would not suffice in a suit concerning a public matter and a public figure plaintiff.[265] The First Amendment requires that the public figure plaintiff prove the defendant made the statement with actual malice.[266] Consequently, statutes under which the plaintiff must establish that the defendant "knew or should have known the statement to be false" would not satisfy this constitutional requirement.[267] The Court reiterated in *Bose Corp. v. Consumers Union, Inc.* that to prove actual malice, a public figure plaintiff must prove the

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STANDARD & POOR'S REGISTER OF CORPORATIONS (1994), *available in* DIALOG, File No. 526. Such cooperatives process, market, and set prices on their goods. Desiree French, *Ocean Spray Harvests Good Times with New Products and Savvy Marketing*, BOSTON GLOBE, Apr. 5, 1984. Ocean Spray, founded as a cooperative in 1930, enjoyed sales of $1.17 billion dollars in 1994. STANDARD & POOR'S REGISTER OF CORPORATIONS, *supra*.

[261] *See* Bateman, *supra* note 188, at 282-84 (citing cases in which "plaintiff farmers, ranchers and the like were not public figures for purposes of their defamation actions"). In *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), *cert. denied*, 454 U.S. 1130 (1981), the court held that a broadcast concerning the deaths of cows at plaintiff's ranch, after rancher had publicized a cattle drive seven years earlier, did not make the rancher a "public figure." 642 F.2d at 374. The court also noted the plaintiff's lack of access to effective methods of communication. *Id.*

[262] *See supra* note 80 and accompanying text.

[263] ALA. CODE § 6-5-622 (authorizing a suit by "any person who produces, markets, or sells a perishable food product"); ARIZ. REV. STAT. ANN. § 3-113(A) (granting any producer or any association representing producers the right to sue); FLA. STAT. ch. 865.065(3)(a) (same). In contrast, Idaho, Louisiana, Mississippi, Oklahoma and South Dakota limit plaintiffs to "producers." IDAHO CODE § 6-2003(1); LA. REV. STAT. ANN. § 3:4503; MISS. CODE ANN. § 69-29-8; OKLA. STAT. ANN. tit. 2, § 3010; S.D. CODIFIED LAWS ANN. § 20-10A-2. Ohio's law includes notice requirements for association plaintiffs. The statute requires that the association of producers notify its members of the suit and distribute any award among those members participating in the suit. OHIO REV. CODE ANN. § 2307.81(D).

[264] *See* 418 U.S. at 351-52 (holding that some plaintiffs may be treated as public figures for a limited range of issues and thus subject to heightened fault requirements pertaining to public figure plaintiffs).

[265] 376 U.S. at 280 (deciding that public official plaintiff must prove that defendant acted with actual malice, "with knowledge that it was false or with reckless diregard of whether it was false or not"); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (applying *New York Times* standard to public figure plaintiffs); *Dun & Bradstreet*, 472 U.S. at 761 (creating new rule that private plaintiffs may receive punitive damages even without showing "actual malice," when relevant statements do not focus on matters of public concern).

[266] 376 U.S. at 280; *Curtis Publishing*, 388 U.S. at 160.

[267] *See, e.g.*, LA. REV. STAT. ANN. § 3:4502(1).

defendant realized the statement's falsity or "subjectively entertained serious doubt" regarding its truth.[268] Agricultural food product disparagement statutes, except those of Arizona, Idaho, and Texas, lack such a standard.[269]

2. *Matters of Public Concern*

While a court may or may not accept an argument that growers or producers qualify as public figures, courts will almost certainly rule that food disparagement laws implicate an issue of public concern.[270] After constitutionalizing defamation law, the Supreme Court stopped focusing so much on whether the allegedly defamatory statement involved a matter of public concern.[271] Nevertheless, in *Dun & Bradstreet*, the Court commented that "every . . . case in which this Court has found constitutional limits to state defamation laws . . . involved expression on a matter of undoubted public concern."[272] Such speech is "'at the heart of the First Amendment's protection.'"[273]

To resolve this issue in an agricultural food product disparagement suit, a court would probably address the statement's "content, form[,] and context . . . as revealed by the whole record."[274] Accordingly, courts have recognized the value of publishing information affecting the public's role as consumers.[275] A federal district court specifically noted the importance of information

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268 466 U.S. 485, 511 n.30 (1984) (citing *New York Times* and *Gertz* as authority).

269 Arizona's remedy is available only to plaintiffs who suffer "damages as a result of malicious public dissemination." ARIZ. REV. STAT. ANN. § 3-113(A). Idaho's statute requires that "the defendant made the statement with actual malice . . . he knew the statement was false or acted in reckless disregard of its truth or falsity." IDAHO CODE § 6-02002(1)(d). Texas further heightened its fault requirement, by forcing plaintiffs to prove that the defendant "knows the information is false." TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(a)(2). Such a requirement of actual knowledge satisfies the actual malice standard.

270 *See infra* notes 272-78, 283 and accompanying text.

271 *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 45 (1971) (holding in a plurality opinion that actual malice standard applies to statements concerning events of public or general interest); 418 U.S. at 343 (rejecting the *Rosenbloom* approach because it could lead to "unpredictable results and uncertain expections"). Ironically, in *Dun & Bradstreet*, 472 U.S. at 749, the Court articulated yet another distinction between those cases brought by private individuals concerning a "purely private matter" and those concerning matters of public interest, leading the Court to embark on a public interest inquiry. *See id.* at 761-63.

272 472 U.S. at 756.

273 *Id.* at 758-59 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (citation omitted)).

274 *Id.* at 761 (citing Connick v. Meyers, 461 U.S. 138, 147-48 (1983)).

275 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763-65 (1976).

regarding "health and safety problems in consumer products."[276] The court further expressed concern that "[i]t would be unfortunate indeed if the threat of product disparagement stifled the free flow of such information."[277] After all, the consuming public relies heavily on the media to broadcast and report on these matters.[278]

Not surprisingly, the federal government expressly recognizes the value of public debate on such issues, affords access to the regulatory process, and provides information on these products.[279] Much of the development and enforcement of environmental law has depended on public participation.[280] However, public partici-

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[276] Bose Corp. v. Consumers Union, Inc., 508 F. Supp. 1249, 1271, (D. Mass. 1981), *rev'd on other grounds*, 466 U.S. 485 (1984); *see also Steaks Unlimited*, 623 F.2d at 280 ("[C]onsumer reporting enables citizens to make better informed purchasing decisions."); Auvil III, 836 F. Supp. at 743 ("[T]he issue of carcinogenic effect of pesticides in the food supply is speech that clearly matters."); *National Nutritional Foods Ass'n*, 492 F. Supp. at 382 ("[Q]ualities and marketing of health food products is certainly" a subject of public interest); *Turf Lawnmower Repair*, 655 A.2d at 426, 427 (quoting Dairy Stores v. Sentinel Publishing Co., 516 A.2d 220, 222-45 (1986), which noted that matters of public interest "include such essentials of life as food and water" and that "widespread effects of a product are yet another indicator that statements about the product are in the public interest"); *see also Dairy Stores, Inc.*, 516 A.2d at 230.

[277] 508 F. Supp. at 1271.

[278] *See* James L. Huffman, *Truth, Purpose, and Public Policy: Science and Democracy in the Search for Safety*, 21 ENVTL. LAW. 1091, 1094-95 (1991) (book review) ("[Prudent consumers] pursue their values on the basis of the information they have, often with a confidence not justified by their knowledge. . . . [W]ithout better information, they will not accept that a better choice exists."); *see also* William Rogers, Executive Director, South Carolina Press Association, Remarks in Opposition to South Carolina S. 160 Before the Subcommittee of the South Carolina Senate Agriculture and Natural Resources Committee (Mar. 15, 1995) (transcript on file with the *Virginia Environmental Law Journal*).

[279] *Cf.* Freedom of Information Act, 5 U.S.C. § 552 (1988 & Supp. V 1993) (requiring that each agency make available all information not exempted upon request); Administrative Procedure Act, *id.* § 553 (1988 & Supp. V 1993) (requiring that promulgation of a new rule be preceded by notice and comment). Environmental statutes also recognize the importance of the public's awareness and participation in agency rulemaking and adjudicatory processes. *See* 7 U.S.C. §§ 136d(d), 136s (1988 & Supp. V 1993) (FIFRA's requirements for public hearings); 15 U.S.C. §§ 2619, 2620, 2647(d)-(f) (1988 & Supp. V 1993) (Toxic Substances Control Act's authorization for citizen complaints, petitions, and civil actions); 16 U.S.C. § 1457 (1988 & Supp. V 1993) (Endangered Species Act's requirement of public hearing and notices of public meetings); 33 U.S.C. §§ 1251(e), 1318(b) (1988 & Supp. V 1993) (permitting and encouraging public participation in administration of the Clean Water Act); 42 U.S.C. § 7414(c) (1988 & Supp. V 1993) (making certain records and reports under Clean Air Act available to the public).

[280] *See, e.g.*, Environmental Defense Fund, Inc. v. Ruckelhaus, 439 F.2d 584 (D.C. Cir. 1971) (holding that the Secretary of Agriculture improperly refused to suspend registration of a pesticide upon the Environmental Defense Fund's petition for review); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (holding that environmental organizations had standing to challenge the Secretary of Agriculture's decision after alleging the injury of biological harm to man and other living things resulting from the Secretary's failure to take action following the group's petition to restrict the use of DDT).

pation depends on the availability of information.[281] Recognizing this, the Supreme Court noted that "the free flow of commercial information is indispensable . . . to the formation of intelligent opinions as to how that system ought to be regulated or altered."[282]

In an agricultural food product disparagement statute, the contested statement necessarily concerns food safety or, impliedly, the environmental effects of agrichemicals.[283] Whether the purpose of the speech is to inform the public of potential dangers or to alert them of a proposed regulation or legislation, such speech merits First Amendment protection.[284] Nonetheless, even if courts deem the speech covered by agricultural disparagement statutes to concern matters of public interest, the statutes' negligence standard may be constitutionally sufficient as long as the plaintiff does not qualify as a public figure.[285] In all cases, the fear of resulting liability may cause those concerned with these issues to censor themselves and remain silent.

E. Presuming Falsity

Traditionally, states can restrict the exercise of free speech constituting defamation and, derivatively, product disparagement. The Court has maintained this traditional exception to the general right of free speech, reasoning that states have a "legitimate state interest . . . [in] compensat[ing] . . . individuals for the harm inflicted on them by defamatory *falsehood*."[286] The Court not only "narrowed the scope" of this exempted protection since *New York Times* and

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[281] 376 U.S. at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (1942) ("The protection of the public requires not merely discussion but information."), *cert. denied*, 317 U.S. 678 (1942)).

[282] *Virginia Bd. of Pharmacy*, 425 U.S. at 765.

[283] *See Barolo Says Streamlining Office Will Enhance Credibility of Program*, *supra* note 91, at 995. Note also that the precipitating events, the Alar controversy and the failed *Auvil* suit, concerned the pesticide Alar. *See supra* part II.A.1.

[284] In the "60 Minutes" report, NRDC highlighted the dangers of Alar to the consuming public to pressure the EPA and FDA to reconsider their methodology for calculating risk. Auvil II, 800 F. Supp. at 943; *see also supra* note 276 (outlining cases designating food product safety as a matter of public concern).

[285] In *Gertz*, the Court rejected the approach preferred by the *Rosenbloom* majority, and authorized states to determine their own liability standards, so long as the state does not impose liability without fault when the action involves a private figure. 418 U.S. at 347; *see also supra* part III.C.1-2.

In Alabama, by providing that "[i]t is no defense . . . that the actor did not intend, or was unaware of, the act charged," the legislature may have tried to make those who "disparage" strictly liable for the effects of their statements. A court may thus find this provision unconstitutional under *Gertz*. *See* ALA. CODE § 6-5-623.

[286] 418 U.S. at 341 (emphasis added).

its progeny,[287] but also imposed on plaintiffs the burden of proving a statement's falsity.[288] Seven of the eleven states with agricultural food product disparagement laws, however, ignored this requirement, authorizing state courts to presume falsity if the information "is not based upon reasonable and reliable scientific inquiry."[289]

In so doing, these states effectively shifted the burden of proof to all defendants to establish the accuracy or veracity of their statements.[290] This conflicts with the Supreme Court's decisions on the matter.[291] In *Philadelphia Newspapers, Inc. v. Hepps*,[292] the Court held that common law presumptions of falsity are unconstitutional when a plaintiff seeks damages against a media defendant and speech of public concern is at issue.[293] Explaining its holding, the Court focused on the potential "chilling effect" of an alternative ruling.[294] Furthermore, weighing the potential impact against the minimal increase in the plaintiff's burden of proof, the majority opined that evidence regarding fault would "generally encompass evidence of the falsity of the matters asserted."[295]

Hepps followed developing defamation jurisprudence. The applicable state law in *New York Times* afforded a defense of truth.[296] However, reasoning that such a defense would compel critics to guarantee the truth of all factual assertions, potentially

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287 R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

288 *See supra* notes 204-08 and accompanying text.

289 ALA. CODE § 6-5-621(1); GA. CODE ANN. § 2-16-2(1); LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a); *see also* ARIZ. REV. STAT. ANN. § 3-113(E)(1) (defining false information as information that is not based on reliable science and which the disseminator knows or should have known to be false); FLA. STAT. ch. 865.065(2)(a) (same); OHIO REV. CODE ANN. § 2307.81(B)(2) (same). In contrast, Colorado requires that the statement be "materially false." COLO. REV. STAT. § 35-31-101. While South Dakota requires that the speaker knew that the statements were false, S.D. CODIFIED LAWS ANN. § 20-10A-1(2), Idaho obligates a plaintiff to satisfy an actual malice standard. IDAHO CODE § 6-2002(d).

290 *See* Johnson & Lowry, *supra* note 7, at 23.

291 *See, e.g.*, 418 U.S. at 340 ("Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.").

292 475 U.S. 767 (1986).

293 *Id.* at 776-77.

294 *Id.* at 777 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)). In *New York Times*, the Court also noted the "consistent[ ] refus[al] to recognize an exception for any test of truth . . . especially one that puts the burden of proving truth on the speaker." 376 U.S. at 271. The Court reasoned that such a burden would lead to media "self-censorship." *Id.* at 279.

295 *Hepps*, 475 U.S. at 778.

296 376 U.S. at 267 (citing Parsons v. Age-Herald Publishing Co., 61 So. 345, 350 (Ala. 1913) ("A defendant's privilege of 'fair comment' for expressions of opinion depends on the truth of the facts upon which the comment is based.").

leading to self-censorship, the Court decided the defense was unconstitutional.[297] Thus, the Supreme Court demonstrated its belief that doubt about the provability of truth, even when believed to be true, "or fear about the expense of having to do so" in a court of law, may deter speech.[298]

The seven veggie libel statutes presuming falsity raise similar concerns. While a speaker may have confidence in the truth of a statement, concerns regarding the ability to prove the statement's veracity may prompt self-censorship, thus inhibiting the exercise of free speech.[299] The discovery conducted in the *Auvil* case illustrates the difficulty of satisfying the falsity standards enacted in Alabama, Arizona, Lousiana, Florida, Georgia, Mississippi, and Ohio.[300] To establish the truth or falsity of the statements made in the "60 Minutes" broadcast, the parties argued about the causes of cancer, the validity of animal tests as predictors of human risk, the appropriate mathematical models to use to extrapolate from animal studies to human risks, and the appropriate cancer risks for consumers.[301] After thirteen months of litigation,[302] the federal district court ruled that the plaintiffs could not prove the defendant's statements concerning these issues to be false.[303]

Ironically, one of the grower's experts testified in the *Auvil* litigation that "there is no such thing as scientific certainty because there is always tomorrow and always new evidence and you never know what the next day will bring."[304] While the statutes do not call for scientific certainty, the reasonableness or reliability of "scientific inquiry, facts, or data"[305] involves the same uncertainty.[306] More importantly, uncertainty about whether a study or method is "reasonable" or "reliable" may have the chilling effect long feared by the Supreme Court of "deter[ring] journalists from pursuing stories about products that endanger public safety."[307]

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297 376 U.S. at 278-79.

298 *Id.* at 279.

299 376 U.S. at 271-72; *Hepps*, 475 U.S. at 777.

300 *See* Johnson & Lowry, *supra* note 7, at 21-23.

301 *Id.* at 21.

302 *Id.* at 22.

303 Auvil III, 836 F. Supp. at 741-43.

304 Johnson & Lowry, *supra* note 7, at 22.

305 GA. CODE ANN. § 2-16-2(1); MISS. CODE ANN. § 69-1-253(a).

306 *See* Johnson & Lowry, *supra* note 7, at 23.

307 *Suits Spur Product Disparagement Statutes*, *supra* note 25, at 5. Similarly, the costs of attempting to ensure the veracity of statements may deter reports on the safety of pesticides and their use on crops. *See* Johnson & Lowry, *supra* note 7, at 21-22 (outlining the discovery "odyssey" which included "exchang[es] of thousands of pages of documents[,]

The agriculture and pesticide industries might argue that, by requiring that the defendants base their statements on reasonable and reliable scientific data, these statutes do not seek to discourage debate, but instead serve to prevent exaggerated or mischaracterized reports of nonexistent dangers. However, the Court expressly addressed the issue of exaggeration in *Cantwell v. Connecticut*,[308] finding that "in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy."[309] Acknowledging instances where "speech is *unknowably* true or false,"[310] the Court in *Hepps* reaffirmed the First Amendment principle that "some falsehood [be protected] in order to protect speech that matters."[311]

V. Conclusion

Information and reports on the safety of agricultural food products is clearly "speech that matters."[312] Judicial interpretation and treatment of the agricultural food product disparagement laws will define the extent to which the First Amendment protects speech concerning pesticides and food safety. Since this speech "fits easily within the breathing space that gives life to the First Amendment," courts should assess the constitutionality of the agricultural food product disparagement laws under defamation jurisprudence.[313] Such an analysis will focus on the fault and falsity requirements outlined in the statutes.

To analyze the articulated fault standards, a court must determine whether the dispute concerns a matter of public interest.[314] Because of the significant public interest in food safety, a court will probably find that a dispute covered by the agricultural product disparagement laws involves a matter of public concern. However, assessing the appropriate fault standard requires a court to decide whether the plaintiff is a "public figure."[315] A court may find that

... [the] select[ion] of expert witnesses[,]" and the deposing numerous experts to establish the truth or falsity of the statements made in the "60 Minutes" broadcast, all of which cost the defendants money).

308 310 U.S. 296 (1940).

309 *Id.* at 310.

310 *Hepps*, 475 U.S. at 776.

311 *Id.* at 778 (quoting *Gertz*, 418 U.S. at 341).

312 *Id.*

313 *See supra* notes 169-71 and accompanying text.

314 *See supra* notes 194-96 and accompanying text.

315 *See supra* notes 188-93 and accompanying text.

an individual plaintiff has significant access to the media or is sufficiently well-known to warrant public figure status. While a producer or cooperative, such as Ocean Spray, may qualify as a public figure, an individual farmer could easily qualify as a private figure. If so, the laws requiring only that the defendant "knew or should have known" would meet constitutional standards.[316]

By contrast, those statutes defining false information as information that "is not based upon reasonable and reliable scientific inquiry"[317] may not survive constitutional challenge. In assessing this presumption of falsity, a court must consider the importance of the speech affected and the possible chilling effect of the statute on the media and public.[318] Affirming these principles, the Supreme Court made clear that a defamation plaintiff must prove the falsity of a media defendant's statement.[319] Because the prohibited statements may be unknowably true or false, they too must be afforded First Amendment protection.[320] Courts in Alabama, Arizona, Florida, Georgia, Louisiana, Mississippi, Ohio, and South Dakota confronted with claims of agricultural disparagement should recognize these principles and provide this important speech with the constitutional protection it deserves.[321]

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316 Louisiana, for example, is one state employing this standard. *See* LA. REV. STAT. ANN. § 3-4502(1).

317 ALA. CODE § 6-5-621; GA. CODE ANN. § 2-16-2(1); LA. REV. STAT. ANN. § 3:4502; OKLA. STAT. ANN. tit. 2, § 3012; *see also* ARIZ. REV. STAT. ANN. § 3-113(E)(1); FLA. STAT. ch. 865.065(2)(a); MISS. CODE ANN. § 69-1-253(a); OHIO REV. CODE ANN. § 2307.81(B)(2).

318 *See supra* note 307 and accompanying text.

319 *See supra* notes 292-93 and accompanying text.

320 *See supra* notes 300-311 and accompanying text.

321 Neither Colorado nor the Idaho statute contain the presumption of falsity. *See supra* note 289.